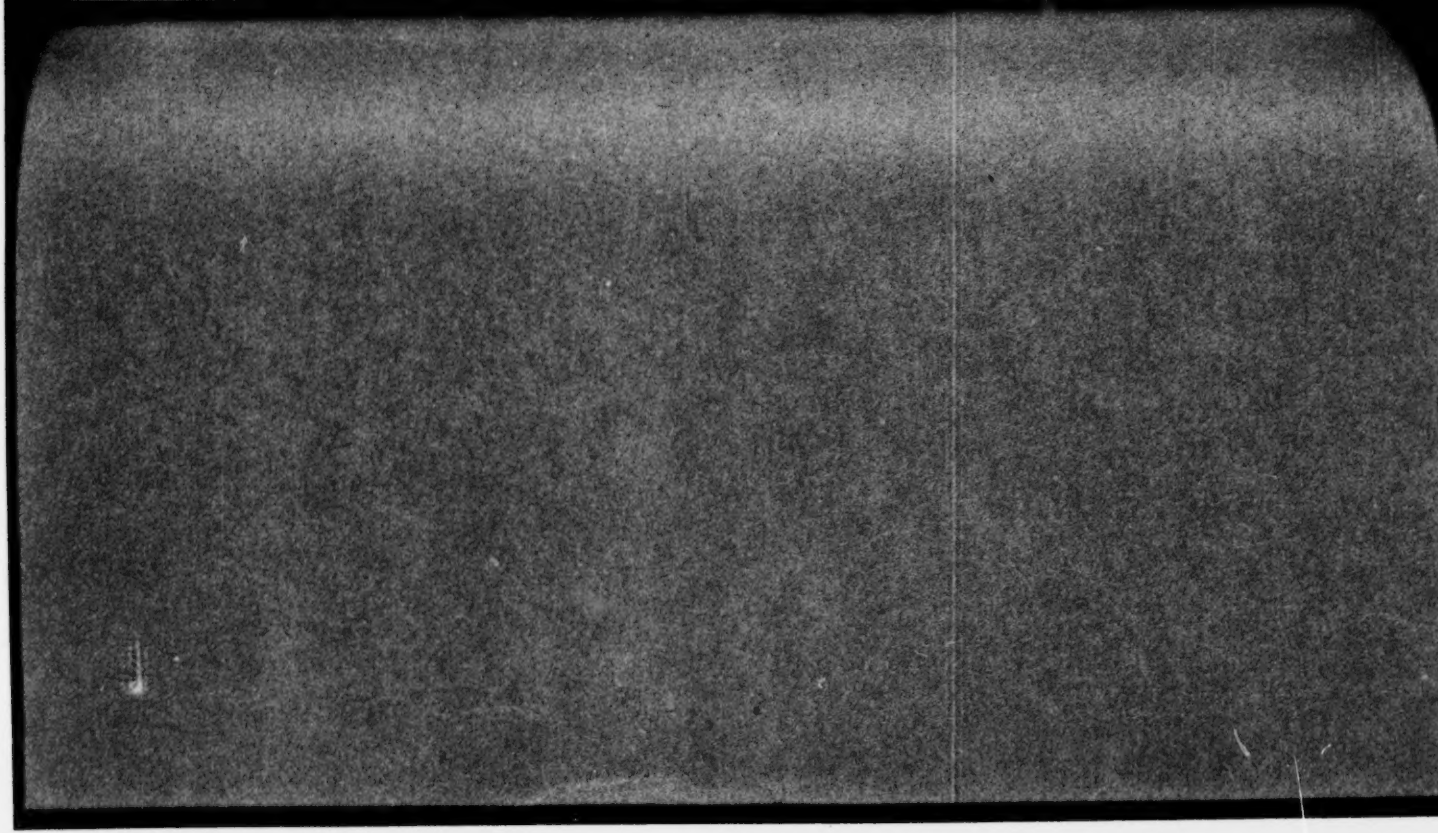

No. 190.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

BRITISH COLUMBIA MILLS, TUG & BARGE COMPANY, LTD., a corporation,

Petitioner,

vs.

A. W. MYLROIE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER

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BRITISH COLUMBIA MILLS, TUG & BARGE COMPANY, LTD., a corporation,

Petitioner,

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A. W. MYLROIE,

Respondent.

No. 190

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER

I.

STATEMENT OF THE CASE.

On the 28th day of December, 1918, the District Court for the District of Alaska, Division Number One, Honorable Robert W. Jennings, Judge, made and entered a decree (Record 734), after trial, dismissing respondent's libel in rem against the tug "COMMODORE." From such decree respondent appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court on October 4th, 1920 (Record p. 765), reversed the decree appealed from and remanded the case with leave to the respective parties to introduce further evidence on the question of damages.

Thereafter petitioner filed in this court its peti-

tion praying that a writ of certiorari issue to the Circuit Court of Appeals, which was granted.

The original libel was sworn to on June 10, 1917, one day after it had been filed in the Clerk's office (Record p. 2).

Original answer filed July 9th, 1917 (Record p. 5).

Amended answer sworn to August 14th, 1917, filed same day (Record p. 6).

On November 10th, 1917, during the trial, libellant was given leave to amend his libel to allege that the tug "Commodore" was unseaworthy and insufficiently manned, pursuant to which leave libellant on November 30th, 1917, swore to, and on December 5th, 1917, filed its amended libel. No other pleadings are shown by record. The trial in the District Court took place on and between November 7th and November 16th, inclusive, 1917; evidence was introduced by both parties on the questions in dispute, and the case was, without objection, tried by the parties, and tried and decided by both the District Court and Circuit Court of Appeals, as if the amended libel and answer denying its allegations were on file at the time of trial.

The amended libel sets up that the libellant was the owner of the barge Bangor, in every respect seaworthy for the voyage from Seattle to Anchorage, Alaska; that the barge laden with cargo, of the greater part of which libellant was

owner and of the balance the lawful bailee, left Seattle on March 21st, 1917, and on the following day was picked up at the international boundary line between British Columbia and State of Washington, by the tug "Commodore," for towage thence to Anchorage, under an arrangement between the owners of the tug and the libellant; that immediately prior to and at the time of picking up the barge and at all times thereafter up to the disaster, the tug was unseaworthy in that it was improperly and insufficiently manned in this: That it had not a sufficient number of members of its crew to enable it to station a proper or any lookout on the tug at any time and especially at night; that at about two o'clock in the morning of March 26th, the tug with her tow was proceeding from Tree Point to Mary Island Light in the waters of Southeastern Alaska, without a lookout, in a heavy wind and snow storm and heavy sea, being then off her course and close to a small islet on the east shore of Mary Island, and sighting land, put her wheel hard over and suddenly changed her course to avoid the dangers of reefs and rocks; and by reason of the sudden strain due to the sudden change of course of the tug, the shackle to which the tow line of the tug was attached, was broken, the barge went adrift and grounded on Mary Island; when in order to relieve the barge from then impending danger it became necessary to jettison a part and to dis-

charge a part of her cargo and to make temporary repairs to the barge and restow her sound cargo before proceeding on her voyage, resulting in damage to cargo, hull, loss of freight, and demurrage amounting to $33,562.47 (amended to $33,521.47; Record p. 176); that the barge, at the time of the disaster, was properly and carefully following the tug and obeying all her directions, and had a competent man at the wheel; that nothing could have been done by the barge to prevent the shackle from breaking, or to prevent the barge from drifting and grounding, all of which was caused solely by the negligence and want of reasonable care, caution and maritime skill on the part of those in charge of the tug.

The amended answer denies any negligence or want of reasonable care, caution or maritime skill on the part of those in charge of the tug; denies the tug was unseaworthy; sets up the towage contract between owners of tug and barge, which contains, *inter alia*, a provision that "*The Tug Company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor*," and affirmatively alleges that it was due solely to the force of the storm and a defect in the equipment of the barge, i. e., the barge's shackle connecting the tug's tow line with the anchor chains of the barge, that the barge broke loose from the tug and grounded; that the damages complained of

were a direct and proximate result of the force of the storm and wind and of defect in the equipment of barge and for causes wholly beyond the control of the tug or those in charge of her; that by reasons of the conditions of the towage contract, and said facts in the amended answer alleged and a lack of any defect in the equipment of the tug or any fault or negligence in her navigation, in the absence of any fault or negligence of owners of tug, or her officers and crew, and because of fault and negligence and lack of proper equipment of the barge, neither respondent tug company nor the tug is liable for or chargeable with any of the damage or injury sustained by libellant.

The tug picked up the tow on March 22, 1917, and the damage to the tow occurred on the 26th of that month.

The issues raised by the parties and tried were:

1. Whether or not the tug "Commodore" was seaworthy.

2. Whether or not there was any actionable negligence on the part of petitioners, or want of reasonable care, caution and maritime skill on the part of those in charge of the tug.

3. Whether, if there were negligence on the part of petitioner, or those in charge of the tug, the contract set up in the amended answer did not exempt the tug and her owner therefrom.

4. Whether or not defects in the equipment of

the barge Bangor (the tow) was the cause of, or contributed to the loss sustained by respondent.

5. Whether or not the negligence of those in charge of the barge under tow was the cause of, or contributed to the loss of the respondent.

6. Amount and measure of damages, if any.

The Findings of the District Court appear at pages 723 to 734, both inclusive, and decide every question of fact in favor of the petitioner.

The opinion and decision of the Circuit Court of Appeals for the Ninth Circuit is found at pages 752 to 764 of the record.

II.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in reversing the decree of the District Court.

2. The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court.

3. The Circuit Court of Appeals erred in holding that the contract of March 14, 1917, between the petitioner (claimant), and respondent did not legally exempt the tug and her owners from liability for negligence in holding that the exempting clause was not enforceable; and in holding that the clause exempting the tug and owners from liability for negligence was contrary to public policy.

4. The Circuit Court of Appeals erred in holding that the petitioner or those in charge of the tug "Commodore" were guilty of any actionable negligence or want of reasonable care, prudence or maritime skill.

5. The Circuit Court of Appeals erred in holding that there was no sufficient lookout properly stationed on the tug at the time of, and prior to the accident and damage to the tow.

6. The Circuit Court of Appeals erred in holding that the tug was rendered unseaworthy by the absence of a man to serve as lookout.

7. The Circuit Court of Appeals erred in holding that the tug "Commodore" was at any time during the voyage unseaworthy.

8. The Circuit Court of Appeals erred in holding that the tug's wheel was put hard over or that any movement of the tug's wheel resulted in a jerk that broke the barge's shackle; or that the tug failed to give the tow any required notice of change in course of movement.

9. The Circuit Court of Appeals erred in holding that the barge's shackle was not defective.

10. The Circuit Court of Appeals erred in refusing to find the barge Bangor unseaworthy by reason of her defective shackle.

11. The Circuit Court of Appeals erred in holding that the break in the shackle would not have occurred but for the negligent navigation of the tug.

12. The Circuit Court of Appeals erred in each of its findings adverse to the petitioner.

13. The Circuit Court of Appeals erred in refusing to follow and confirm the findings of the District Court.

ARGUMENT.

III.

a—FINDINGS OF THE DISTRICT COURT AND THEIR EFFECT.

For the findings of the District Court upon which respondent's libel was dismissed, reference is made to the record, page 723.

These findings are very complete, and petitioner contends, find specifically every issue of fact in favor of petitioner and against respondent. In making such specific findings, the Court, in closing this opinion, says it is unable to find "*Any* actionable negligence on the part of the tug * * * the burden of showing negligence was on the plaintiff." In other words, the Court finds that there was no negligence on the part of the tug or those in charge of her.

EFFECT OF FINDINGS.

"The Ninth Circuit has held that findings of fact, made by the district court on conflicting evidence, will not be disturbed on appeal, unless clearly contrary to the evidence, which holding is contrary to the idea that an appeal is a new trial."

Benedict, Par. 566, citing:

The Alijandro, 56 Fed. 621.

Whitney vs. Olson, 108 Fed. 292.

Jacobsen vs. Lewis Klondike Expedition Co., 112 Fed. 73.

Alaska Packers' Assn. vs. The Domenico, 117 Fed. 99.

The Oscar B., 121 Fed. 978.

Paauhau Sugar etc. Co. vs. Palapala, 127 Fed. 920.

Upon this point, the Circuit Court of Appeals for the Ninth Circuit, in *The Dolbadarn Castle*, 222 Fed. 840-848, said:

> "The well settled rule is applicable that the findings of fact of the trial court will not be disturbed in this court unless it clearly appears that there was error."

See also

The Bailey Gatzert, 179 Fed. 44.

The Hardy, 229 Fed. 985.

Aetna Insurance Co. vs. Davidson, 257 Fed. 68 (C. C. A.).

The lower court dismissed a libel in Admiralty filed against a schooner for damage to a load of corn split by a submerged obstruction, and this dismissal was affirmed, on appeal, Baker, Circuit Judge, saying, pp. 68 and 69:

> "As the trial judge saw and heard the witnesses, his findings upon the issues of fact will not be set aside unless the cold type in the record demonstrates that a material finding either was unsupported by evidence or was made in the face of a clearly ascertainable preponderance to the contrary;"

citing the two following cases:

Royal Exchange Assurance vs. Graham & Morton Transp. Co., 166 Fed. 32, 92 C. C. A. 66.

Monongahela River Consol. Coal Co. vs. Schinnerer, 196 Fed. 375, 117 C. C. A. 193.

In the former case, *Royal Exchange Assurance vs. Graham etc. Co.*, the lower court found in favor of libellant, who sued on several policies of marine insurance, and the decrees for libellant were affirmed on appeal, the court, by Seaman, Circuit Judge, saying, on page 36 or 166 Fed.:

> "The finding of such ultimate fact is not conclusive upon appeal, but is entitled to much weight; and under conflicting testimony, with witnesses before the trial judge, will not be set aside unless it clearly appear that the conclusion is either unsupported by the evidence or against the evidence."

The Edward Smith, 135 Fed. 32, 34, 67 C. C. A. 506.

Jameson vs. Lewis, 131 Fed. 728, 729, 65 C. C. A. 586.

Alaska Packers' Assn. vs. Domenico, 117 Fed. 99, 101, 54 C. C. A. 485.

Monongahela River etc. Co. vs. Schinnerer, 196 Fed. 375, which was a libel in *personam*.

The Circuit Court of Appeals affirmed the de-

cree for libellant the court, per Knappen, Circuit Judge, saying, on page 379:

> "There is, however, a sharp conflict as to the facts alleged to constitute respondents' negligence; and although we have considered the testimony *de novo*, we do this in recognition of the rule stated by Judge (now Mr. Justice) Lurton, in *City of Cleveland vs. Chisholm*, 90 Fed. 431, 434, 33 C. C. A. 157, 160, that:
>
> " 'The judgment of the District Court will not be reversed when the result depends along upon questions of fact depending on conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses, and had an opportunity of weighing their intelligence and candor.'
>
> "The rule thus stated has peculiar force as applied to the consideration of the testimony in this case. So far as concerns the question of respondents' negligence, we are not impressed with their contention. upon the authority of the *City of New York*, 54 Fed. 181, 4 C. C. A. 268, that the rule we have referred to has no application, from the fact that no opinion was filed by the District Judge, for it is obvious that the latter could not have rendered decrees for libellants with-

out finding respondents guilty of negligence causing the death of decedents"—

and thus an investigation of the cases above cited by the Appellate Court will disclose the fact that they are but varying statements of the old and well established rule which accords great weight to the findings of fact by the court below which heard and saw the witnesses, and that such findings of fact must stand undisturbed on review unless they be self-convicted of palpably erroneous conclusions.

And this rule is maintained in

The Alijandro, 56 Fed. 621 (C. C. A.).
Whitney vs. Olsen, 108 Fed. 292 (C. C. A.).
Jacobsen vs. Lewis Klondike Ex. Co., 112 Fed. 73 (C. C. A.).
The Oscar B., 121 Fed. 978 (C. C. A.).
Paauhan etc. vs. Palapala, 127 Fed. 920 C C. A.).
Baker-Whitely Coal Co. vs. Neptune Nav., 120 Fed. 247 (C. C. A.).
The Lucy, 74 Fed. 572 (C. C. A.).
The Bowden, 78 Fed. 649 (C. C. A.).
Coastwise T. Co. vs. Baltimore S. P. Co., 148 Fed. 837 (C. C. A.).
The Brandywine, 87 Fed. 652 (C. C. A.).
The E. Luckenbach, 93 Fed. 841 (C. C. A.).
The Anaces, 106 Fed. 742 (C. C. A.).

All cited in Benedict's Admiralty (4th Ed.), in Notes 20 and 21 to Par. 566. And

Escanaba Traction Co. vs. Burns, 257 Fed. 898 (C. C. A.).

The court, per Knappen, Circuit Judge, said, on page 901:

> "The entire testimony * * * was taken in open court. There was express testimony supporting the court's conclusion; and this conclusion we are bound to accept, unless the evidence decidedly preponderates against it."

Petitioner further begs leave to call attention to the manifestly wide latitude afforded by the District Court to respondent in presenting to the fullest extent all the testimony he adduced and offered in support of his case.

The trial judge not only saw the witnesses and heard them testify and noted their demeanor upon the witness stand. their candor or lack of candor, their knowledge of the things they testified about, but he also went aboard the "Commodore's" sister ship, the "Haro," and inspected her, as she was lying at the wharf at Ketchikan at the time of trial. He was peculiarly qualified to make findings in the case.

Respondent admits that the burden of proof was on him, but claims that having established the insufficiency and inefficiency of the lookout the burden shifted to the claimant as to the remaining issues, exclusive of the measure and amount of damages and claims that the decisions, viz:

The Alijandro, 56 Fed. 621.

Spencer vs. The Dalles etc. Nav. Co., 188 Fed. 865; and

The Sampson, 217 Fed. 347,

as to review, do not apply. We think they do apply in all their vigor, because respondent did not establish either the insufficiency or inefficiency of the lookout.

Respondent will claim that the District Court did not affirmatively find that the tug had a proper lookout properly stationed. On this phase, the Court is respectfully referred to that portion of the District Court's opinion headed "Lookout" record, page 731, which we submit is an unequivocal finding in favor of petitioner.

The Court further finds, record, page 733:

> "The question is not whether the master of the tug took every precaution which a common carrier of passengers is required to take, but rather did he omit to do something which ordinary care required (meaning, of course, the highest care exercised by ordinarily prudent masters under the circumstances) and was that omission a contributing cause of the casualty? I feel that under the evidence this question must be answered in the negative as to each branch."

This finding amounts to a statement that there was a proper lookout, properly stationed, because it is the duty of the master to see that this is done. This finding is two fold, viz:

1. The master omitted nothing that prudent masters would or should have done.

2. That no omission of the master contributed to the loss.

Moreover, the last paragraph of the opinion (Record, p. 734) is an express finding on the point in favor of petitioner, for it includes every charge of negligence made.

But, even if there had been no findings whatever, the Court could not have found a decree in favor of respondent and dismissed the libel without finding that the tug had a proper lookout properly stationed, or that the absence of the lookout did not cause or contribute to the accident.

City of Cleveland vs. Chisholm, 90 Fed. 431, above quoted.

The claim that there was no affirmative finding of fact that the "Commodore" had a proper lookout properly stationed is its own refutation, for

1. The burden of proof of negligence is on respondent.

2. The burden of proof never shifts.

3. Respondent did not discharge that burden.

4. The law does not require vain things, and the lower court, in dismissing the libel, said at the very end of its memorandum opinion (Record, p. 734): "Whether *The Syracuse* or *The Oceanica* is to be followed, the burden of showing negli-

gence was on the plaintiff. (6 How. 384; Fed. Cases, No. 14329.)"

The one necessary conclusion, then, is that the "Commodore" had, for the purposes of this case, i. e., under the circumstances, a proper lookout, properly stationed, and this is all the law requires when findings of fact are concerned. It was the positive equivalent of an affirmative finding that she was properly equipped, and to require the court to add that affirmative finding would be a work of supererogation. This futility of such requirement is voiced in

Monongahela R. Co. vs. Schinnerer, 196 Fed. 375 (C. C. A.),

where, in affirming a decree for respondent in a negligence cause, but in which the lower court filed no opinion, Knappen, Circuit Judge, said, p. 379, as to the District Judge

> "It is obvious that the latter could not have rendered decrees for libellant without finding respondents guilty of negligence causing death of decedents."

See also,

The Kallisto, 14 Fed. Cas. 99.

The R. R. Kirkland, 48 Fed. 760, at 762.

The Hercules, 80 Fed. at 999.

Clyde Nav. Co. vs. Barclay, Law Reports, 1 Appeal Cases (House of Lords) 790 (1876).

In the last named case, the House of Lords

affirmed a dismissal of the libel and held that respondent vessel was not bound to prove a negative, i. e., an absence from fault, as the burden was on respondent to establish negligence.

On page 732 of Record are two statements in the memorandum opinion of the court that fully meet respondent's requirements. Jennings, District Judge, there says:

> "There is a preponderance of the evidence * * * that the pilot house is the most efficacious place for a lookout. The 'Commodore' * * * did have an experienced man in the pilot house who testified that in fact he did keep *constant* lookout * * * Whatever the character and situation of the lookout really was, *it was good enough* to enable the tug to avoid collision with the island, and it would have enabled the barge likewise to avoid such collision had not the shackle broken."

All of that language is affirmative and words can not be more convincing of the mind of the court. It is hypercritical to demand that the court express itself in an affirmative formula of equivalent meaning. Taken in connection with the last paragraph of the memorandum decision on the merits, that meaning was that the tug "Commodore" had an efficient lookout under the circumstances, which efficiency embraced the fact that such lookout was properly stationed; and for us

to attempt fuller explanation of that meaning is simply juggling with words and sentences. It is quite inconceivable that the Appellate Court will reverse the lower court for not stating affirmatively what is necessarily contained in one conclusion, which amply negatives petitioner's negligence as to lookout. "Equity looks not at the form, but at the substance."

Again, respondent's objection here is entitled to no consideration for the further reason that the facts as to the lookout are not thereby brought into question by the objection, but merely the form of the finding as to sufficiency of the lookout, and the lower court expressly passed on that.

The damage to the tow was not occasioned by the tug's violation of any positive rule of navigation or Act of Congress on Navigation or by the total absence of a lookout on the tug which would throw on the libelled vessel the duty of explanation of such violations. There is no rule or Act of Congress positively requiring a lookout on the bow of a tug (though in close quarters, in crowded thoroughfares such lookout has been declared necessary), and hence it is always a matter of judicial determination under the situation. Collision cases holding a tug liable for violation of positive rules of navigation or Acts of Congress or in the total absence of lookout are inapplicable. The District Court on the question of lookout found (Record, page 732):

> "Now, in the case at bar the absence or inefficiency of such lookout as respondent contends should have been had, *did not cause any collision.* Whatever the character and situation of the lookout really was, it was good enough to enable the tug to avoid collision with the island, and it would have enabled the barge likewise to avoid such collision *had not the shackle broken.*"

And the court finds that the shackle did not break through any neglect of petitioner, but because it was defective. Under this finding the doctrine of *The Annie Lindsley,* 104 U. S. 191, applies; which rules that the owner of a vessel whose lookout was shown to be negligent is not liable for the consequences of a collision when his neglect had nothing to do in causing it. See, also, cases cited under title "Lookout," *infra.*

b—THE TOWAGE CONTRACT.

The "Commodore" was a tugboat 135 feet over all in length (Record, p. 97), 18 or 20 feet deep and 26½ feet wide at widest part; the Bangor, 165 feet in length, average width 36 feet, depth loaded 11½ feet average (Record, p. 101). Under written contract dated March 14, 1917 (Cl. Ex. 2), petitioner agreed to tow the Bangor from the international boundary line to Anchorage and return, at a price agreed upon. The contract was signed by petitioner at Vancouver, B. C., and transmitted by mail to respondent at Seattle with

a letter stating in substance that some changes had been made from the form of contract previously submitted by respondent. The respondent signed the contract at Seattle and returned it with letter signed by him dated March 15, 1917, in the following language (Ex. 3):

"Anchorage, Alaska, March 15, 1917.

B. C. TUG & BARGE CO.,
Vancouver, B. C.

Dear Sirs:—

I am just in receipt of agreements which I am signing and enclosing your copy. I notice in the rewording of this agreement that you have omitted that which you should have put in, and added some which should have been omitted, but I am a good gambler and have signed as written. However, I think that I am entitled to a letter from you confirming our verbal agreement, that in case of negligence on part of tug or crew, your company should be held liable for damage to barge or cargo.

Further that in case of damage to barge, which would require dry-docking or other repairs which might require several days, I should be released from paying demurrage of $100.00 per day on tug.

I feel confident of fair treatment from you, and hope you have the same confidence in me.

I am fully expecting to get away on the 20th of this month, and am using every effort to be all prepared to leave the mill on that date. Will wire you definite time before Saturday night.

Yours very truly,

A. W. MYLROIE.

P. S.—The Anchorage Supply Co. is not a corporation, therefore no seal is attached to within agreement. I have signed this as the sole owner of above company."

To this last quoted letter petitioner replied by letter as follows (Ex. 4):

"ANCHORAGE SUPPLY CO.,
5502 15th N. E.,
Seattle, Wash.

Dear Sirs:—

We beg to acknowledge receipt of your letter of the 15th inst., with which you returned one copy of the Towing agreement dated 14th March, duly signed.

With regard to your remarks in the first paragraph of your letter, we have met you as far as we can in the contract as signed having regard to the risks we run as compared with the amount we are to receive for the service of our tug, and we must therefore rely on the contract as it stands.

With regard to the second paragraph, we consider that the 8 lay days allowed you be-

fore charging demurrage are the utmost we can afford. If the barge requires to be laid up for any longer period than 8 days, and if you do not desire to pay the $100.00 per day, then we would be at liberty to employ the tug in other services until such time as the barge may be ready. It would not be fair to us to keep the tug waiting for an indefinite period.

Trusting that you will clearly see our position in this matter, and that same will prove satisfactory to all concerned.

Yours very truly,

B. C. MILLS TUG & BARGE CO., LTD.,

JAH/R Secy."

The contract of towage between the parties was in writing (Record, page 66), and the following is a copy thereof:

"MEMORANDUM OF AGREEMENT made the 14th day of March in the year of Our Lord One Thousand Nine Hundred and Seventeen between the B. C. MILLS TUG & BARGE CO., LIMITED, whose registered office is situated in the City of Vancouver in the Province of British Columbia (hereinafter called 'the tug Company') of the one part, and ANCHORAGE SUPPLY CO. of Seattle, Washington, of Anchorage, Alaska (hereinafter called 'the Charterers'), of the other part.

WITNESSETH:

I. That the Tug Company agree to tow

during the spring, summer and autumn of the year 1917 the barage 'Bangor' on a succession of round trips between the Western Boundary Line of United States Waters, and Anchorage, Alaska, for the sum of $4,500.00 for each such round trip, the said Barge to be loaded on the North bound trip and light on the South bound or return trip.

2. The Tug Company will employ their tug 'Commodore' in said service barring accident to hull and/or machinery, Government requisition, or other causes beyond the control of the said Tug Company.

3. That the Tug will render to the said Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and whilst discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency which might arise. *The Tug Company is not to be held liable for any damage which might happen to the said Barge 'Bangor' or its cargo while in tow or at anchor.*

4. A round trip is to be considered completed on return of said Barge 'Bangor' at Western Boundary Line of United States Waters off the Southern entrance to Plumper Sound, and the said sum of net $4,500.00 shall be paid by the Charterers to the Tug

Company on completion of each round trip and before another is commenced.

5. The Tug Company shall allow the Charterers eight lay days, Sundays included, on each round trip, the said eight lay days to include all waiting time at Seattle and Anchorage, Alaska. Any waiting for a longer period than eight days to be paid for by the Charterers at the rate of $100.00 per day or pro rata for any period less than a day.

6. This agreement shall be in effect on or about the first day of April, 1917, till on or about the first day of November, 1917, the Charterers to give ten days' notice if tug is required earlier than the first day of April, 1917. If the Charterers shall not take the said tug by the tenth day of April, 1917, the Tug Company shall be at liberty on giving twenty-four hours' notice of their intention so to do to cancel this agreement and shall thereupon be at liberty to seek other employment for the said tug.

7. The Charterers shall give satisfactory guarantees as to payment upon delivery of the said barge in manner above mentioned.

8. That if during the life of this agreement any salvage services are performed, then after payment of the expense in connection therewith the balance shall be divided

share and share alike between Owners and Charterers.

IN WITNESS WHEREOF these presents have been executed by the parties hereto the day and year first above written.

THE COMMON SEAL of B. C. TUG & BARGE Co., Limited, was affixed here to in the presence of:

'E. W. HAMBER,' Director,

'J. A. HENDRY,' Secretary.

THE COMMON SEAL of the Anchorage Supply Co. was affixed hereto in the presence of:

'ANCHORAGE SUPPLY CO.'

By A. W. MYLROIE."

To refer again briefly to the contract of towage: The signed contract is petitioner's Exhibit 7. Petitioner's Exhibit 2 is the letter written by respondent to petitioner after respondent signed the contract. That letter contained the following: "I feel confident of fair treatment from you, *and hope you have the same confidence in me.*" Petitioner's Exhibit 3 is a reply to the letter which is its Exhibit 2. Exhibit 3 says: "With regard to your remarks in the first paragraph of your letter, we have met you as far as we can in the contract as signed *having regard to the risks we run as compared with the amount we are to receive for the service of our tug*, and we must therefore rely upon the contract *as it stands.*"

From this correspondence, it appears that in

consideration of the respondent assuming the risk of loss through the negligence of those in charge of the tug, the petitioner fixed a price for the towage service less than would have been fixed had the respondent not assumed such risk of loss. The respondent knew this, because in his letter (Exhibit 2) he said: "I am a good gambler and have signed as written." It is evident that if respondent had refused to sign the contract exempting the tug and owner from liability on account of negligence, petitioner would not have undertaken the towage service. When respondent signed the contract, he was willing to assume the risks of loss through negligence of the tug or crew, for the reason that he was receiving an equivalent therefor in the reduction of the price of towage. He was willing to pocket that advantage, but after the loss he wished to pocket not only that advantage but to claim also the advantage that he would have had without the contract of exemption. While a contract contrary to public policy will not be enforced by the courts, yet a Court of Justice should not be used to enable respondent to take advantage of an unconscionable claim, but we in nowise concede that the contract in question is contrary to public policy.

Respondent's attitude since the loss occurred does not tend to justify his expressed hope that petitioner would have confidence in him.

Pursuant to such contract the tug took hold of

the barge at the international boundary line as agreed upon on the evening of March 22, 1917. There being four men aboard the barge, viz: Capt. Thomas Foster as super-cargo, the captain, and two other men (Record, p. 32), and aboard the tug thirteen men, viz: Frank Johnson, master; Captain Anton C. Bjerre, pilot, who signed on as purser; one mate, two engineers, two firemen, two coal passers, one cook and three deck hands (Record, p. 208), which was more than a full crew (Record, p. 209). The barge was attached to the tug by the following towing device: The tug's hawser connected to the Bangor's shackle which was attached to the Bangor's anchor chain. The shackle belonged to the Bangor (Record, p. 19), it having been purchased by respondent about May, 1916, from a ship chandler on the waterfront, Seattle (Record, p. 181). It was 7:10 p. m., and getting dark when the tug took hold of the barge)Record, p. 315). Captain Foster, for respondent, connected the tug's hawser to the barge's shackle and anchor chain, and the voyage proceeded.

Note this fact, that the shackle was an appliance furnished by respondent.

The tug's hawser was 1200 feet in length, of which 1080 feet were off the drum of the tug's towing machine, and the remaining 120 feet were on the towing machine drum.

The voyage proceeded until 1:45 a. m. on March 26, when it was interrupted by the break-

ing of the shackle and consequent stranding of the barge.

If the petitioner is right in the contention that the contract (which clearly and explicitly was intended to exempt the tug and owners from liability for negligence (see Cl. Exhs. 2, 3 and 4) relieved the tug and owner from liability for negligence, then it will not be necessary for the court to consider the findings or the evidence, and the decree of the Circuit Court of Appeals must be reversed.

If on the other hand the court shall hold that a contract exempting the tug and her owners from liability arising out of the negligence of those in charge of the tug, is not valid or enforceable, then we contend that the decree should be reversed because the findings of the lower court, based on conflicting evidence or upon evidence as to which there was no conflict, will not be set aside. We further contend that even if this were a trial *de novo* in this court, the evidence shows, beyond any reasonable controversy, that the petitioner was not negligent in respect to any of the allegations of the amended libel, or otherwise, and the decree must be affirmed.

(1) The towage-contract, set forth above exempting the owner of the tug from responsibility for damage resulting from the tug's negligence, is valid.

Robinson vs. B. & O. R. R. Co., 237 U. S. 84.

Santa Fe R. R. Co. vs. Grant Bros. Co., 228 U. S. 117.

Baltimore & Ohio R. R. Co. vs. Voigt, 176 U. S. 498.

Hartford Fire Ins. Co. vs. Chicago R. Co., 175 U. S. 91 at 98.

The William H. Webb, 14 Wallace 406.

The Oceanica, 170 Fed. 893 (Second Circuit).

The Maine and Manhattan, 170 Fed. 915 (Second Circuit).

Monks vs. Cornell Steamboat Co., 198 Fed. 472 (Second Circuit).

M. P. Doullut & Son vs. G. G. Co., 221 Fed. 876, 880 (Fifth Circuit).

McCormick vs. Shippy, 119 Fed. 226 (D. Court), 124 Fed. 48 (Fifth Circuit).

Canton Ins. Co. Ltd. et al. vs. The Goliah, Dist. Court, Western Dist. of Washington, No. 4264 in Admiralty, decided Nov., 1917. (Certified copy of opinion herewith.)

Alexander vs. Greene, 3 Hill. 19.

Scrutton on Charter Parties, page 199, Note K.

36 Cyc. 292.

Moore on Carriers, 2nd Ed. Vol. 1, p. 14, and cases cited in Note 46.

Kittie Ten Eyck vs. Director General (Second Circuit, year 1920).

Same case, District Court, decided March 27, 1920.

The Maine, 161 Fed. 401.

The Merrimac, 17 Fed. Cases, No. 9478.

United Service, 8 Prob. 56, affirmed in Court of Appeals, 9 Prob. 3.

Luna vs. Kingston, 36 Times Law Reports 112 (Dec. 1919).

In *Wells & Tucker vs. Steam Navigation Co.*, 2 N. Y. 204, Bronson, J. for the Court, said, on page 208:

"It is clear that *those who tow boats and vessels are not common carriers of the things towed.* As we are all agreed in this opinion, and the point has been adjudged (*Canton vs. Rumney*, 13 Wend. 387, and *Alexander vs. Greene*, 3 Hill 9), I will not discuss the question more at large. * * * They may make just such stipulations as they please concerning the risk to be incurred. They may say, we will answer for nothing but a loss happening through our own fraud or want of good faith. In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain as they think will answer their purposes. There is, I believe, no authority to the contrary, and on this question, as well as the other, we are all agreed."

And the tug owner was held exempt.

In *Alexander vs. Greene*, 3 Hill 9, the New

York Appellate Court, in an opinion by Bronson, Judge, more fully discussed the character of a tugboat, its liability for loss, etc., and similarly ruled that such boats are not common carriers and are perfectly free to stipulate thereon as they please, and against liability for loss by reason of their own negligence.

In *The Kittie Ten Eyck*, an Admiralty case (C. C. A.) *supra*, the Court say:

> "In *B. & O. R. R. Co. vs. Voigt*, 176 U. S. 498, the Court held that an express messenger in an express car by contract, could exonerate the railroad company from liability to him and that such contract did not contravene public policy. This was held because it was said that the railroad company did not assume toward him the obligations of a common carrier as it would to a passenger because he was not a passenger; that as to him it assumes the obligations of a private carrier, and that a private carrier is free to contract as to the conditions of the carriers and no reason of public policy forbids such carrier from stipulating against its own negligence and making it a part of the contract. To the same effect are the cases of *Robinson vs. B. & O. R. R. Co.*, 237 U. S. 84, and *Santa Fe R. R. Co. vs. Grant Bros. Co.*, 228 U. S. 177."

There is no question of public policy involved in the private contract between petitioner and

respondent, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide against liability for negligence.

Hartford Fire Ins. Co. vs. Chicago etc. R. R. Co., 175 U. S. 91, 99.

Kittie Ten Eyck (C. C. A.), *supra.*

In *McCormick vs. Shippey*, 124 Fed. 48, it was held in the Second Circuit that it is competent for a charterer of a vessel not a common carrier to stipulate in the charter party against his liability for loss or damage to the vessel through his negligence, there being no question of public policy involved, as in the case of common carrier. This case was cited with approval by this Court in the case of *Santa Fe R. R. Co. vs. Grant Bros. Co.*, 228 U. S. 177; and in the *Santa Fe* case this Court, after recognizing the rule that a common carrier, when acting as such, may not enter into a contract exempting itself from liability for negligence, said:

> "Manifestly this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case it is dealing with matters involving ordinary considerations of contractual relations; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repug-

nant to the requirements of its public service."

The *Santa Fe* case reviews the authorities on the question involved in the instant case and we submit is controlling; that, under it, the contract in question exempted petitioner and its tug from responsibility for negligence, and is valid. To same effect is the later case from this court, *Robinson vs. B. & O. R. R. Co., supra.*

The Oceanica, 170 Fed. 893, Second Circuit, decided May 19, 1909, and followed by subsequent cases in that court, is a leading case; it overruled the former decision of that court as announced in *The Edmund L. Levy,* 128 Fed. 683. It holds that a towage contract, by which the tow assumes all risks, releases the tug from liability for her own negligence, resulting in injury to the tow; and that such contract exempting the owner also exempts the vessel. It reviews prior decisions, including *The Syracuse,* 12 Wall. 167.

It may be claimed that the decision in the Oceanica was based on the theory that in New York, even a common carrier may by contract exempt itself from responsibility for its own neglect. The Circuit Court of Appeals for the Ninth Circuit evidently were of that impression; but the opinion in the Oceanica distinguishes between tugs and common carriers, and shows that a tug exemption contract is not contrary to public

policy as defined by the Courts of the United States.

Even if the public policy of New York permitted a carrier to exempt itself from responsibility for negligence, effect would not be given by Courts of the United States to such exemption contract.

The Kensington, 183 U. S. 263, 46 L. Ed. 190.

Same case, 94 Fed. 885 (Second Circuit, New York).

Respondent's misconception of the law is seen:

(a) In his construction of the remarks of Davis, J., in *The Syracuse*, 12 Wall. 167.

(b) In his artificial interpretation of *The Oceanica*, *supra*, and of the Supreme Court's denial of a writ of certiorari therein (215 U. S. 599).

The Syracuse, 12 Wall. 167, was never a precedent against validity of tug exemption contracts, and the Supreme Court has never regarded it as such, for the reason that the court did not there consider a contract was proven. Justice Davis expressly says at the outset of his opinion: "It is unnecessary to consider the evidence relating to this *alleged* contract of towage," etc.; and in the lower court Judge Nelson said: "*This* contract does not exempt the steamboat," etc., but the Supreme Court has never ruled that a tug *cannot* exempt herself, by appropriate words, from

the result of her negligence. On the contrary it has impliedly indorsed the validity of such contracts, as is lucidly explained and defended in *The Oceanica* by refusing to disturb that decision. Further, we call especial attention to this singular coincidence: In the several lower court decisions cited in reliance upon *The Syracuse* as a precedent the contract either falls short of clearly exempting the tug and her owners, or is not proven; and the same remark is applicable to the "alleged contract" in *The Syracuse*. Especially is this true in *Alaska Commercial Co. vs. Williams*, 128 Fed. 362 (C. C. A.), where the "proposed contract" was expressly excluded from admission to the record by the lower court, and that may explain the significant omission of any mention of that case by Neterer, D. J., in his decision for respondent in November, 1917, in *Canton Ins. Co. Ltd. et al. vs. The Goliah* (a certified copy of which has been filed with the clerk of this court by petitioner), in which entire validity was accorded to a tug exemption contract, quite similar to that in the case at bar.

In view of Judge Ward's broad and able opinion in *The Oceanica* clearly distinguishing between tugs and common carriers, it is strange that respondent should seize upon one casual sentence therein as the basis of the decision, viz., that relating to New York law enabling a common carrier to exempt itself by contract. *The Oceanic*

decision was broadly reasoned, and a tug exemption contract is shown not to be contrary to public policy, but to be construed as are contracts in other relations than that of tug and tow and held to exempt from results of negligence.

In the case of *B. & O. R. R. Co. vs. Voigt*, 176 U. S. 498, *supra*, it is said:

> "Exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding."

And the court is there referring to common carriers. Now, as a tug is not a common carrier, her owner, as a private person may, by contract with the owner of a tow, freely exempt his tug and himself from liability for negligence of her crew, as the contracting parties deal at arm's length and are not bound by technical principles or rules alleged to be against public policy when considering common carriers. Argument here is quite unnecessary, but a reading of the Court's opinion in the *B. & O. vs. Voigt* case, and the later cases from that court cited *supra*, will wholly dissipate the theory that "the New York law" influenced either that decision or the ruling in *The Oceanica*.

The contract in the case at bar so clearly and explicitly exempts the "Commodore" tug and her owners from all liability for negligence that it

is merely multiplying words if we attempt to enlarge upon it. The intention of the parties to it to so regard it could hardly have been better expressed, and that intention was clinched to the contract by the correspondence between Mr. Mylroie and the Tug Company above set out. Nothing is left to inference as to their intention to regard the Tug Company as wholly exempted thereby from all liability for negligence of the tug either to the tow or its cargo while in tow or at anchor. Even where such contracts do not expressly exempt from negligence, the courts will enforce such exemption where the necessary inference is that such was the intention of the parties. See the cases cited by Judge Ward in *The Oceanica*, at page 394.

The cases of

The Syracuse, 12 Wall. 167;
The Edmund L. Levy, 128 Fed. 683;
The Somers N. Smith, 120 Fed. 574;
The M. J. Cummings, 18 Fed. 178;
The Jonty Jenks, 54 Fed. 1021, and
The American Eagle, 54 Fed. 1010,

are not applicable to the present case, for in those cases the pivotal words of the towing contract were "at the risk of" the tow or the vessel being towed, while in the case at bar the words were "The Tug Company is not to be *held liable* for any damage which might happen to the said barge," etc. The tug's liability in the last six

cases was due to the fact that the contract did not plainly and clearly express the intention to exempt the tug and her owners, and such intention the law requires must appear in the contract, expressly or by necessary inference.

The Westminster, 102 Fed. 366.

The St. Hubert, 107 Fed. 727, at pp. 730, 731, Certiorari of *The St. Hubert* case was denied by the Supreme Court, 21 Supreme Court Reporter, 925.

In the case of *The Edmund L. Levy*, 128 Fed. 683, it was held: That "the agreement of the canal boat to be towed at her own risk did not exempt the tug from liability for damage occasioned by her own negligence." This case was decided by the Circuit Court of Appeals, Second Circuit, on March 4, 1904. It is significant that the *same court* overruled that case in *The Oceanica*, 170 Fed. 893, on February 16, 1909.

In Volume 1, page 14, section 12, of Moore on Carriers, 2nd Ed., are cited many cases to sustain the text that a contract exempting a tug from liability is entirely valid and not contrary to public policy.

2nd Moore on Carriers, p. 14, note 46.

On the question of the policy of the federal laws regarding the exemption from liability on account of negligence, see page 166 of Hughes on Admiralty where the Harter Act is discussed;

and also page 173 of same volume, where the author says (referring to the Harter Act):

> "The general scheme is to make the vessel liable for faults in connection with the ordinary shipment and towage of cargo, but to allow her to exempt herself from liability for mere negligence in navigation after the voyage commences."

Under the Harter Act a failure of the crew to properly close a port hole was a fault of navigation which did not render the vessel unseaworthy.

The Sylvia, 171 U. S. 462, 19 Supreme Court Reporter, 7, 43 Law Edition 241.

And for other cases on this point see

Hughes on Admiralty, pp. 175, 176.

Under the Interstate Commerce Act, even a common carrier may limit its liability arising out of its own negligence.

B. & M. R. R. Co. vs. Rooker, 34 Supreme Court Reporter 526.

N. Y. C. etc. Co. vs. Beaham, 37 Supreme Court Reporter 44.

From the above it will be seen that contracts exempting from liability for negligence are not contrary to public policy, but are recognized as valid both by acts of Congress and judicial decisions.

Referring again to the case of *Alaska Commercial Co. vs. Williams*, 128 Fed. 362, we have

examined the briefs filed in the Circuit Court of Appeals and it appears that the defendant in error cited the *Syracuse* case and all the District Court cases on the same point; the plaintiff in error did not argue the point at all but contented itself with saying that those cases did not apply. At that time, the *Oceanica* case had not been decided, and it clearly appears that plaintiff in error considered the point immaterial. This statement is made to show that the *Alaska Commercial* case was decided on the *assumption* that the defendant in error correctly stated the law to be that a contract exempting from liability for negligence is contrary to public policy and void, and not on any consideration of the decisions or law by the court itself. What the court would have held, had the point been contested, or even questioned, does not appear. Clearly the decision should be given no weight, under the circumstances. It has never been cited by any federal court.

The unsupported dictum of Sheppard, District Judge, in *The Monarch*, 235 Fed. 795, at 799, that the tug could not contract away its liability for negligence, has never been cited by any federal court, nor was there any appeal therefrom. The legal question of validity of contractual exemption of a tug from liability for negligence was not raised nor discussed.

It is idle today to attempt to restrict the appli-

cation and scope of the doctrine of

The Oceanica, 170 Fed. 893.

That case has withstood similar attempts in other courts, and we believe has set at rest all reasonable contention against exemption of the tug and its owner by contract from liability for his negligence. And not only that: but that case reannounced the doctrine that when the tug's owner is thus absolved from liability for his negligence, the tug itself is, thereby, also exempted. And this conclusion accords both with common sense and authority. The citation of authorities upon common carriers, in support of respondent's contention is inapt for *they* are *insurers*, and that element does not exict in a contract of towage; for, as was expressly stated by Ward, Circuit Judge, in *The Oceanica*, 170 Fed., at page 894:

> "A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care. *The Margaret*, 94 U. S. 495, 24 L. Ed. 146. It fellows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier."

That case was expressly followed in

Monk vs. Cornell Steamboat Co., 198 Fed. 473 at 475 (C. C. A.),

in which case, at p. 475, Ward, Circuit Judge, said:

> "When the boat towed assumes all the risks of towing, it assumes the risk of the tug's negligence, as we have held in *The Oceanica*, 170 Fed. 893, 96 C. C. A. 69, because, the tug not being an insurer or common carrier, want of ordinary care and prudence is all the tug and owners are responsible for. There is nothing else for the contract assuming all risks to operate on."

(2) THE TUG COMMODORE WAS NOT A COMMON CARRIER.

The Margaret, 94 U. S. 495.

The Oceanica, 170 Fed. at 984.

Kittie Ten Eyck, supra, Fed. (1920 Second Circuit).

Also cases *supra*.

(3) A CONTRACT AGAINST LIABILITY FOR NEGLIGENCE CANNOT BE CONSTRUED IN THE CASE OF A TUG AS IT MAY BE IN THE CASE OF A COMMON CARRIER.

The Oceanica, 170 Fed. at 894.

Baltimore & O. R. R. Co. v. Voigt, 176 U. S. 498.

Robinson v. B. & O. R. R. Co., 237 U. S. 84.

Santa Fe R. R. Co. v. Grant Bros. Co., 228 U. S. 177.

Hartford Fire Ins. Co. v. Chicago R. R. Co., 175 U. S. 91.

All other cases cited in subdivision 2 *supra*.

(4) That there is a conflict among the District Courts of the United States as to the validity of a contract exempting a tug and her owner from responsibility for her own negligence. See:

Canton Insurance Co. vs. Goliah, (certified copy opinion filed herewith).

McCormick vs. Shippey, 119 Fed. 226.

M. P. Doullut & Son vs. G. C. Co., 221 Fed. 876.

Kittie Ten Eyck vs. Director General, (Dist. Court N. Y., March 27, 1920).

The Merrimac, 17 Fed. Cas. No. 9478.

The Monarch, 235 Fed. 795.

In re Moran, 120 Fed. 569.

The M. J. Cummings, 18 Fed. 178.

The Jonty Jenks, 54 Fed. 1021.

(5) A towage contract which exempts the *owner* of a tug from all liability for damage resulting from the tug's negligence exempts the *tug itself*.

Bancroft vs. Queen of the Pacific, 180 U. S. 49, 21 Sup. Court 278, 45 L. Ed. 419.

The St. Hubert, 107 Fed. 727 (C. C. A.).

The Westminster, 102 Fed. 368 (D. C.).

The Oceanica (supra), 170 Fed. 893 (C. C. A.).

(6) Respondent's contention that the towage contract never attached by reason of the alleged unseaworthiness of the tug is wholly untenable

in the face of the proven facts to the contrary to the effect that the tug "Commodore" not only had a full, competent and experienced crew of officers and men, but an additional master mariner of long experience in those waters, who occupied the position of lookout during the entire night of the accident.

The fallacy of respondent's argument at this point, and the inapplicability of the cases he cites thereon, viz.:

The Edwin T. Morrison, 153 U. S. 199; and

The Caledonia, 157 U. S. 124,

will be apparent at once when we consider that in those cases the unseaworthiness was the cause of the loss, while in the case at bar respondent has wholly failed to establish either that the "Commodore" was unseaworthy, or that unseaworthiness caused or contributed to the loss alleged in the libel.

But respondent endeavors to extend his reasoning to "adequacy of crew an element of seaworthiness" and claims that petitioner's alleged failure in this respect was a breach of the tug's implied duty, i. e., a breach of warranty of seaworthiness which is not expressly stipulated for in the towage contract, and that therefore the tug is still liable for such alleged breach of warranty. But we assert respondent is not sustained on that point by the authorities, and this is chiefly because there is no pertinent analogy, for the

purposes of this case, between a formal bill of lading and a private contract for towage. Even if we grant, for argument's sake, that petitioner's crew was inadequate, the burden yet rests upon respondent to establish that such inadequacy was the cause—or a contributing cause—of his alleged loss or damage; and in the one particular that the absence of a lookout forward was such cause. Respondent cannot shout "inadequacy of crew,' fold his hands, and penalize petitioner for abstract "'inadequacy." There must be a connection between inadequacy and damage.

It will thus be seen that respondent's theory of inadequacy of crew really rests upon the establishment of want of separate lookout forward of the pilot house as the cause of his loss, and if that want was not the cause, a breach of warranty of seaworthiness is totally irrelevant to respondent's alleged cause of action here. Indeed, petitioner's answer to this theory of inadequacy is precisely the same as the reasoning of the Federal Court in those cases where, admitting the want of a lookout forward was improper, yet, if the accident or collision would not or could not have been prevented had such lookout been so stationed, then the absence of that lookout was immaterial and not a culpable fault. So, if our crew was not "adequate,' we claim that such inadequacy did not cause respondent's loss, and hence petitioner cannot be held responsible for

a disconnected result. And in our reasoning on this point we are sustained by similar reasoning of Fuller, C. J., in

The Caledonia,

where he says, near the close of his opinion:

> "By reason of the unseaworthiness of the Caledonia * * * loss was incurred,"

and the carrier, therefore, was properly held responsible, but petitioner cannot admit that the loss in the case at bar was caused or contributed to by any inadequacy of crew, and we contend, therefore, that although a vessel may, in fact, be inadequate in structure or crew, yet such inadequacy must be culpable as a *cause* producing the *loss*, or the fault—i. e., the breach of warranty—is excused as immaterial.

In *La Normandie*, 58 Fed. 427 (C. C. A.), affirming 43 Fed. 151 (collision), the court ruled that if the number of officers and crew of a vessel on deck when a collision is impending is sufficient to perform all the duties required of her, it is immaterial that more are not there.

In the *Kallisto*, 14 Fed. Cases, page 99, the court said:

> "As to lookouts it is not contended that there were not a sufficient number of men on the deck of the Kallisto on the occasion of this collision. There were three men on deck, besides the helmsman and the regular lookout. The only ground, therefore, on

which respondent could found a charge of fault against the Kallisto, is in respect to the position on the bark in which her regular lookout was at the time of the collision. * * * I know of no rule of navigation or of law fixing any particular place forward at which the lookout shall at all times stand on a vessel in motion. * * * The burden of proof is upon the respondent, and I am clear that, as against this lookout, they have done no more, even if they have done that much, than raise some 'doubt' whether the collision was not owing to the fault of the lookout on the Kallisto not being on the top of the forward house just before and at the time of the collision. * * * The rule applicable, therefore, to this case, and which governs it, is the one laid down by the Supreme Court of the United States, in *The Grace Geidler*, 7 Wall. (74 U. S.) 196; that 'when there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.' * * * I will confine my decision to the declaration that the respondent's charge of fault in the Kallisto is not proven; and I will sign a decree dismissing the respondent with costs, giving 30 days for an appeal."

(Note in above case the court does not find affirmatively that the respondent vessel was not

at fault, but merely decided that respondent's charge of fault "is not proven.")

As will be shown, and as the District Court found, the Commodore was, in fact, sufficiently manned, and had an efficient lookout properly stationed.

The amended libel of respondents alleged that the tug "Commodore" at the inception of the towage was unseaworthy and insufficiently manned, in that she did not have a sufficient crew to maintain a legal lookout on the vessel during the voyage. This allegation petitioner denied, and the District Court found the facts in favor of petitioner.

The Circuit Court of Appeals for the Ninth Circuit decided that at the time of the loss, the tug "Commodore" did not have a proper lookout but did not decide that the tug was "not provided with a crew adequate in number and competent for their duty with reference to all exigencies of the intended route" (*The Lady Pike*, 21 Wall. 1), including lookout duty. The said Court did, however, say that because the lookout duty was improperly and negligently performed, the vessel was "to that extent unseaworthy."

Petitioner submits that even if the lookout duty was improperly and negligently performed, the vessel was not thereby rendered unseaworthy, there being aboard the tug at the inception of, and at all times during the voyage, as the evi-

dence abundantly shows, an adequate crew of competent seamen, besides one additional experienced master mariner, also a member of the crew, who performed during the entire night of the loss, the duties of lookout. If there was negligent performance of lookout duty, *it was mere negligence*, liability for which was exempted by the contract. The vessel was seaworthy, even if lookout duty was negligently performed by those charged with that duty. If there was a fault, it was one of *navigation* (*The Schooner Catherine vs. Dickinson, et al.*, 17 How. 162), not amounting to unseaworthiness. To same effect see Arnould on Marine Insurance, Ninth Edition, Volume Two, Section 692 (page 879), *et seq.*

If contrary to our understanding of their decision, said Circuit Court of Appeals intended to decide that the vessel was unseaworthy because insufficiently manned to afford a proper lookout, then, we submit that such decision is contrary to the weight of and not supported by the evidence, and is clearly erroneous. The full and adequate complement of officers and seamen was twelve (Record, p. 209, Johnson, master). On the trip in question the tug had thirteen officers and men, the additional or extra man being Capt. Bjerre (Rec. pp. 207-209), a master mariner for 28 years (Rec. p. 228), who had worked on the sea since he was sixteen years of age on all kinds of ships (Rec. p. 18) and who between the

years 1914 and March, 1917, either as master on a tug, towing barges, or as pilot and assistant to the master, had made 20 or 25 round trips through the very channel where the accident occurred (Rec. p. 229) and who was accustomed to act as lookout (Rec. p. 257). The qualifications of Captain Bjerre to act as lookout cannot be questioned. He was signed on the tug as purser but was acting as pilot (Rec. p. 231) on the trip in question (Rec. pp. 208-209). On the night of the stranding (which occurred at about 1:45 A. M.) he was acting as lookout from 11:30 P. M. until the tug anchored after seven o'clock the following morning (Rec. pp. 231, 232, 257, 317) and was in the pilot house continuously during that time (Rec. pp. 231, 257, 317).

Likewise, we submit that the decision of said Circuit Court of Appeals, holding there was negligent or improper performance of lookout duties, is contrary to and not supported by the evidence, and clearly erroneous.

Petitioner further submits that even if the tug was rendered unseaworthy by reason of inadequacy of lookout, and damage resulted thereby to respondent, no recovery may be had, because such damage was the result of mere negligence and not from unseaworthiness and the contract exempted the tug therefrom. The contract (paragraph 3) provides: "The Tug Company is not to be held liable for any damage which may hap-

pen to said barge 'Bangor' or its cargo while in tow or at anchor."

IV.

The Lookout.

(1) The crew of the tug: The full and adequate complement of officers and men was twelve (Record, Capt. John, on p. 209). On this trip she had thirteen; the extra man being Capt. Bjerre (Tr., pp. 207-209), a master mariner since 1889 (Record, p. 228), who had worked on the sea since he was sixteen years of age on all kinds of ships, (18); who also between the years 1914 and March, 1917, either as master on a tug, towing a barge, or as pilot and assistant to the master, had made 20 or 25 round trips through the very channel where the accident occurred (Record, p. 229) and accustomed to act as lookout (Record, p. 257). The qualifications of Capt. Bjerre to act as lookout cannot be questioned. He was signed on the tug as purser, but was acting as pilot (Record, p. 231) on the trip (Record, pp. 208, 209). On the night in question he was acting as lookout from before 11:30 p. m. (before reaching Tree Point, Record, p. 232), until the tug anchored the next morning (Record, pp. 231, 257, 317) and was in the pilot house continuously during that time (Record, pp. 231, 257, 317). In the Circuit Court of Appeals respondent assumes that the regularly-employed third deck-hand (Record, pp. 207-209) was "the

odd man, the thirteenth member of the crew," but as a matter of fact Capt. Bjerre was the *extra* man, as the record abundantly shows (Record, pp. 207-209; 261). On the assumption that the tug had an insufficient number of men, respondent claims there was no proper lookout, but this argument entirely overlooks the evidence and the findings. If the evidence justifies the conclusion of the lower court that there was a proper lookout, then it necessarily follows that the tug was sufficiently manned for that purpose, and the respondent's argument is completely answered. This contention of respondent amounts only to a claim that there was no proper lookout, hereinafter discussed.

(2) The lookout and his station: Capt. Johnson of the tug testified that Capt. Bjerre came into the wheelhouse about 11 p. m. and stayed there continuously all the balance of the night "keeping a lookout" through the open window (Record, p. 317); that he, Johnson, was in the pilot house from 6 p. m. until next morning after the accident, except when he went aft for a few minutes about 11:30 p. m. to put the towing machine in automatic gear (Record ,p. 317); that although his watch ended at midnight he stayed on watch because "it looked kind of dirty, snow, blowing and raining;" that Capt. Dawe, mate, whose watch began at midnight, came into the pilot house at that time and stayed three-quarters of

an hour or an hour and then under Capt. Johnson's orders he went to the towing machine (Record, pp. 317, 318); that Capt. Dawe did not return to the pilot house before the shackle broke (Record, p. 318). While Croft, for libelant, testified that at the time of sighting the island, he and Bjerre and Dawe were in the pilot house, and that Johnson was not there, yet in this he is flatly contradicted by Bjerre (Record, pp. 235, 236), Johnson (Record, p. 318), and Dawe (Record, p. 379), each of whom testified Dawe was not then in the pilot house, but that Johnson and Bjerre were there. The court, in other instances where Croft contradicted Bjerre, Johnson, and Dawe, found that Croft was mistaken (Record, p. 725).

Capt. Johnson testified: That he, Capt. Bjerre, and Capt. Sam Dawe, the mate, were all on watch after midnight, on the night of the accident; that the quartermaster was at the wheel; that they (meaning himself, Capt. Bjerre, and Mate Dawe) were all on the lookout in the wheelhouse; that there was no separate lookout between the wheelhouse and the stem of the vessel; that the wheelhouse is about forty feet from the stem and that the floor of the wheelhouse is about twelve feet above the bow, that there are no obstructions between the wheelhouse and the stem and nothing between the wheelhouse and stem to obstruct either sight or sound; that the

windows in the pilot house were all open; that they were lying out through the open window; that objects could be discerned from the vessel better from the pilot house than from the stem of the vessel and better than from any other part of the vessel and that sounds from the wheelhouse could be heard better than from the stem of the vessel (Record, pp. 203-205); that he directed the course of the vessel that night (Record, p. 313); that Bjerre was in the pilot house from about 11 o'clock on the night of the accident until the next morning and was not out of the pilot house between 11 o'clock and the time the shackle broke; and that Bjerre was there "keeping a lookout"; that the pilot house windows were open; that he, Johnson, had charge of the navigation of the vessel (Record, p. 317); that the custom of tugboats in those waters was always to keep the lookout in the pilot house and that in this instance the "Commodore" followed this custom (Record, p. 324); that on vessels whose wheelhouse is located pretty well *midship* and which has *forecastle head*, the lookout might be on the forecastle head, but that on such vessels the wheelhouse is located *seventy-five to one hundred feet back from the stem*, and that the vessels which have a lookout on the bow are *freight boats;* that the "Commodore" has no forecastle head; that Johnson had the lookout in the wheelhouse because the stem of the vessel would

not be any good for that purpose and because the lookout would not be close to the bow because of the bitt, davit and windlass located in the bow of the vessel; that a lookout can best see and hear from the pilot house on a tugboat; that on the night in question four of the windows were open (Record, pp. 324-325); that the pilot house on the "Commodore," witness believes, is thirty-five or forty feet abaft the stem; that between the stem and the wheelhouse there are some low obstructions which do not obstruct the view from the pilot house.

Capt. Bjerre testified: The pilot house is between thirty-five and forty feet from the stem (Record, p. 98); the eyes of an ordinary man while standing in the pilot house would be about eight feet higher than the bow of the vessel and about sixteen feet higher than the surface of the water; there are no obstructions between the pilot house and the stem of the vessel (Record, p. 99); the pilot house is on the bridge; the pilot house is fourteen feet atnwartship and six or eight feet fore and aft of the vessel; the wheel is in the pilot house; the pilot house is in the form of half circle with windows all around (Record, p. 100); I was shore captain for claimant, supervised the construction of the "Commodore" in 1908 (Record, p. 300); have been master mariner since 1889 or 1890, and as master or assistant made twenty or twenty-five trips through

the channel where the accident occurred (Record, p. 229); on this trip I signed on the "Commodore" as purser, but was acting as pilot; was in pilot house continuously from before 11:19 (Tree Point) until the vessel anchored next morning at 7:00 a. m.; not out of the pilot house during that time; Capt. Johnson was also in the wheelhouse all of that time except before 12 o'clock when he went out to set the towing machine in motion; prior to reaching Tree Point at 11:19 that night I was keeping a lookout and caught a glimpse of Tree Point light (Record, pp. 231-2); kept a sharp lookout for whale rocks and black rocks; Johnson and I saw outline of land, after we had run NW½W, compass course, long enough to pass those rocks, which we thought was Duke Island; the vessel was then slowed down and Johnson changed the course to NW, compass course; after running onehalf or threequarters of an hour we sighted small island not less than half mile ahead; I presume I saw that small island as soon as it was visible to the eye from the tug; "I was keeping a very close lookout" (Record, p. 133); I was looking out of the starboard window at the time I saw the island (Record, p. 134). Capt. Dawe went from the pilot house to the towing machine a half hour or more before the shackle broke, and between the time he left the pilot house and the time the shackle broke I "*was not marking the time down*,

or the course, or anything else; I was keeping a good lookout and I did not make any note of the time or anything like that" (Record, p. 236); was hanging out of the window of the pilot house (Record, p. 250); the custom of tug boats in southeastern Alaska is to keep lookout in pilot house; vision is clear there and sound can be better detected than from the deck "especially going through the water, the wind is blowing the water and splashing it on the side, or if there is any sea running you can get a better vision over the swells" (Record, pp. 262-3).

Q. "Do you know of anything that you could have done as a skillful, careful, prudent navigator to have prevented the tug going in where she was that night half a mile off the island when you sighted it?

A. "I don't know anything that we could possibly have done that would have made any difference to us; we done everything that anyone could possibly do" (Record, p. 265); between the time (1:00 a. m.) the half point change was made and the time the small island was sighted (a few minutes before 1:45 a. m.) I was looking for land *all the time and if any land could have been seen I would have seen it* (Record, p. 267); my eyesight is good (*id.*); the nature of the night prevented seeing the small island sooner (*id.*); the low equipment between stem and pilot house would require lookout, if on deck, to stand back

10 feet from stem (Record, p. 277); these obstructions do not obstruct vision from pilot house (Record, p. 281); at 1 o'clock I pointed out what I thought was Duke Island to Capt. Johnson (Record, p. 291); I was not in command of the tug and Capt. Johnson gave the orders, except that I may have "passed word" after consulting Capt. Johnson; I did not have charge of tug, but was "there looking after the interest of the vessel" (Record, p. 292); I did not have a watch the night of the accident (Record, p. 260); but I went on the bridge because "I was pretty much interested, you know, and it was a dirty night and I was there to give Frank (Capt. Johnson) all the help I could; and my position in the company, of course, I was interested in the vessel, and her welfare, and I was out there to *keep a lookout* and give Capt. Johnson all the assistance I possibly could in taking care of the vessel and the tow (Record, p. 261).

Q. "What kind of a lookout did you keep at, and all the way up from, Tree Point to the time you sighted the small island?

A. "*We kept a very sharp lookout,*" I am accustomed to keeping a lookout (Record, p. 257); I did not see or hear any breakers until after we broke away and until after we had made the second circle in an endeavor to get the barge (Record, p. 257).

Capt. Dawe (mate) testified: I have been a sea-

faring man 14 years; have had master's papers for seven years; three years in sailing ships and balance of time on freight and tugboats in British Columbia and southeastern Alaska; as mate on "Commodore" I made thirty round trips through the channel where accident occurred, in 1915, 1916 and 1917; have navigated the "Commodore" in night time, through the channel; I came on watch that night at midnight and went into the wheelhouse and stayed three-quarters of an hour, then went to towing machine and stayed there until after the shackle broke (Record, pp. 277-279); Capt. Johnson was navigating the ship while I was in the pilot house and Capt. Bjerre and the quartermaster were in the pilot house (*id.*); couldn't see land very far that night; the wheelhouse is thirty-five or forty feet from the stem (Record, p. 384); on tug boats plying in southeastern Alaska the custom has been to keep lookout in the wheelhouse because he can both see and hear better from there than from any other part of the tugboat; as master I have run tugs for three years in southeastern Alaska (Record, pp. 385-6); Capt. Bjerre was keeping a sharp lookout all the time I was in the wheelhouse; I heard Bjerre ask Capt. Johnson if he didn't think it would be well to slow the vessel down, and Johnson said yes, and did so (Record, p. 390); there are no obstructions from the pilot house of the "Commodore," either to sight or sound

(Record, p. 391); there is no forecastle head on the "Commodore" (Record, p. 390); a lookout on the deck of the "Commodore" couldn't hear very well for the wash of the boat through the water; and he couldn't see very well over the bow unless he went from one side to the other," and if on the deck the lookout would have to stand fifteen or sixteen feet back from the stem (Record, p. 391); Capt. Johnson told me to stand by the towing machine (Record, p. 395).

Capt. F. L. Harriman testified: Am master mariner and have been for twenty-five years; have been running through Revillagigedo Channel since 1897 (Record, p. 467), and been towing barges through it last three years steady; we never carry a lookout outside of the lookouts in the pilot house (Record, p. 468); "I never carry any lookout except myself and whoever is on watch at the wheel (*id.*); the officer on the tug is the lookout and he stays in the pilot house (*id.*); am master of tug 'Actic' and her pilot house is thirty-five or forty feet from the stem (Record, p. 472); I came into port at 3 a. m. this morning and had not been subpoenaed" (Record, p. 478).

Capt. H. R. Smith testified: Have been master mariner since 1889; became seaman in 1872; between 1874 and 1878 made 48 round trips through Revillagigedo Channel as sailor (Record, pp. 212-213); twelve round trips in 1889 as pilot on an-

other vessel; twenty-four round trips as second and chief officer and pilot on the "Bertha"; eight or nine times on the "Yucatan"; five times as officer on the "Seward"; four times as officer on the "Nome City"; fifteen or eighteen round trips on the passenger vessel "Spokane"; three times as master of passenger ship "Montara"; one round trip as master of tug "Tyee"; one round trip as mate of "Taku"; about one hundred fifty trips in all (Record, pp. 215-217); know the tug "Commodore" and the location of her pilot house and proper place for lookout on her is in the pilot house (Record, pp. 241-2); it is customary to keep lookout in the pilot house of the tug going through that channel; pilot house is higher and gives a better and clearer observation and one can hear much better from pilot house than in the bow (Record, pp. 242-244-246); it is the custom on tugs plying in southeastern Alaska for the bridge officer to act as lookout (Record, p. 247).

Capt. S. Snoddy: Have been master mariner for twelve years; am master of freight and tow vessel "Amur" and have towed vessel four trips summer of 1916 from Tree Point past Mary Island and made about twelve trips through those waters (Record, p. 650); during the last two and one-half years (Record, p. 655); know tug "Commodore" (Record, p. 654); *on the "Amur"* (250 feet long, Record, p. 667, and whose pilot house is a little forward of midships and 100

feet back from the stem, Record, p. 263) I would not put a lookout on the bridge unless the weather was *very thick;* if *very thick* I would put lookout on forecastle head (Record, p. 656); I know the "Commodore" and the location of her bridge and I would not have thought it necessary at any time before the shackle broke, to put a lookout on the forecastle head, because he can see fifty times better from the wheelhouse than from anywhere else; and the same as to hearing if the pilot house windows are down (meaning open) (Record, p. 661); a man on the forecastle head on the "Commodore" or from any other part of the ship could not hear or see so well as from the pilot house (*id.*) and in the wheelhouse of the "Commodore" is the proper place for the lookout (*id.*); I would not say that if wheelhouse is more than thirty feet from stem it would not be proper place for the lookout "because a wheelhouse is that much higher than the bow. You have that much advantage in the distance over the bow, that much more height" (Record, pp. 662-3).

Capt. Snoddy knew the weather conditions at the time and place of the accident.

Capt. Thos. Nielsen testified: Master mariner since 1888; commenced to run through above named channel in 1897, and have spent more than half my time making trips there, towing barges (209 trips, Record, pp. 676-7); have been aboard

the "Commodore" and have been aboard of and have towed the "Bangor" many times (Record, pp. 668-9); have navigated that channel in pretty nearly all conditions of weather and tides (Record, p. 671); I have a lookout on the forecastle head and I also lookout myself from the pilot house (Record, pp. 681-2).

It does not appear from Capt. Nielsen's testimony where, with reference to the stem of his vessel, the pilot house was located, on those occasions when he would have a lookout on the bow; he did not testify that the pilot house of the "Commodore" was not a proper station for a lookout for he was not asked anything about it; he did not testify that the pilot house in his vessel would not have been the proper station for a lookout. His statement that he would have a lookout on the bow was merely a general statement without reference to the character or size of the vessel or the location of the pilot house. This statement as to location of lookout was purely in the abstract. His testimony shows that he many times found himself in the same position as the "Commodore" was and was unable to account for it (Record, pp. 667-697).

Capt. J. E. Brinker, witness for petitioner, a master mariner for many years through said channel (Record, p. 622), who made two trips through it as master of tugs, pilot and otherwise (*id.*), *was not asked anything on direct-examina-*

tion as to the lookout or his station, but on *cross-examination* by respondent, and after witness had been given the conditions of the weather and the circumstances (Record, p. 630), he said that the wheelhouse is the proper and best place for the lookout under the conditions existing the night of the accident.

Capt. Thos. H. Cann (Record, p. 567), Capt. Jacob Jacobson (Record, p. 581), Capt. E. J. Smith (Record, p. 603), and Capt. O. Olsen (Record, p. 636), all testified for claimant by deposition at Seattle, before the trial at Ketchikan, and were not present at the trial; on November 10, during the trial respondent was given leave to amend his libel (Record, p. 209), by alleging that the tug was unseaworthy at time of commencement of voyage because of not having sufficient crew to maintain a legal lookout during the voyage. None of the four last named witnesses were asked by claimant concerning lookout because not informed at that time that any such question would be raised, and at Ketchikan at the trial, other witnesses, except Capt. Harriman and Capt. Smith, were not obtainable, but it will be noticed that they (who were procured merely because they chanced to be there) testified directly in favor of petitioner and it may safely be assumed that all other tug masters would have given testimony to the effect that the pilot house of the "Commodore" was a proper station for the lookout and that such is

the custom on tugs whose wheelhouses are, like that of the "Commodore," close to the bow. Petitioner objected to the amendment, but was overruled. We have already referred to the findings of the court on the question of lookout, and again urge that those findings under the evidence shown by the record, are conclusive. Respondent offered no evidence to contradict or qualify any of the evidence above set out.

Respondent is singularly unfortunate in his citations of authorities on this point (in the Circuit Court of Appeals) and this becomes apparent on an inspection of those citations in their order:

Thus, in

Wilder's S. S. Co. vs. Low (C. C. A.), 112 Fed. 161 (9th Circuit),

the cause of action was collision between the libeled ocean-going steamship "Claudine" and the barkentine "William Carson." The "Claudine" had *no lookout whatever*, and her officer in charge saw the barkentine's lights ahead ten minutes before the collision. Morrow, Circuit Judge, said, on page 172:

> "For an officer to leave his vessel *entirely without a lookout, especially when another vessel is known to be in the vicinity*, is culpable negligence."

And the court was careful to say that the lookout rule is to be applied

"whenever the circumstances are such as to call for its application."

Plainly, we think, in the case at bar, the law as to lookout was fully complied with. And his Honor then quotes from respondent's next citation, viz:

The Ariadne, 13 Wall, 475, 20 L. Ed. 542, a cause of collision wherein the steamer "Ariadne," colliding with a brig, was held to the highest degree of care as to steamships maintaining a lookout, especially in regard to avoiding collisions with less powerful vessels, viz: sailing vessels. Mr. Justice Swayne said, on page 543:

> "The waters near the city of New York are at all times crowded with shipping. * * * The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. * * * It (the rule as to lookout) is applied with full force to the steamships belonging to our commercial marine. It is the duty of all courts charged with the administration of this branch of our jurisdiction to give it the fullest effect *whenever the circumstances* are such as to call for its application."

The next case cited by respondent is

The Pilot Boy, 115 Fed. 873 (C. C. A.), which was a libel against the "Pilot Boy," an ocean-going steamer, for collision with a schooner,

and the steamer was held without fault, and this was affirmed on appeal, Simonton, Circuit Judge, said, on page 875:

> "It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout, beside the helmsman, and, in case of collision, the absence of such lookout is *prima facie* evidence that the collision was caused by the fault of the steamer. * * * But the absence of a lookout is not conclusive of fault. It may appear that the collision could not have been guarded against by a lookout. * * * Hamilton, the helmsman, * * * was the pilot and lookout."

The collision was at a narrow place in a river, and the wheel was on the hurricane deck. In closing his comments on the testimony, the Judge said:

> "But be this as it may, the trial judge heard all the witnesses, weighed their credibility, and decided against the libelant."

Earlier in his opinion he called attention to the rule that a steamer must always avoid collision with a sailing vessel, and if such collision occurs the presumption is that the steamer was at fault.

The Genesee Chief, 12 How. 443, enunciated the paramount duty of a steamer to avoid sailing vessels. The cause was one of col-

lision on Lake Ontario, between a schooner and a steamer. Taney, C. J., plainly stated, page 462, that, in such instances, there should be

> "some one in a favorable position to see, stationed near enough to the helmsman to communicate with him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass."

There was no separate lookout, and the steamer was held liable.

The Ottawa, 3 Wall. 269, 18 L. Ed. 165, was a cause of collision on Lake Huron between a steamer and a schooner, and the same rule applied, whereby the steamer was held properly convicted of negligence in not having a separate lookout in addition to the helmsman. Nor was the master such a person as could be called a proper lookout. As to location of lookout, the court, Clifford, J., said, page 167:

> "Persons stationed on the forward deck are nearer the water line, and consequently are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement."

The Dauntless, 129 Fed. 715 (C. C. A. 9th Circuit):

Here the cause of action was for death caused by collision of a steamer with a launch in a river. The separate bow watchman was *not at his post*

of duty in the bow of the steamer, and, further, the steamer violated article 25 of rules of navigation which required steamers to keep well to the starboard side of narrow channels. These two facts convicted the steamer of negligence, and this finding was affirmed.

The Rambler, 66 Fed. 355, D. C.,

was a libel cause against a tug for, *first*, taking tow out at night in the North River (New York) in thick running ice; *second*, placing the tow forty feet ahead of the tug, and *third*, not having a good watchman stationed at the front of the tow on the lookout to avoid injurious cakes of ice. Thick ice broke holes in the tow and sunk it, and the tug was held liable. The man on the tow was employed by the tug, but was only acting to some extent as a lookout; he was the tug's agent. The District Judge added:

> "There was no fixed lookout at the bow of the tug."

But this remark stands alone without further censure.

Dredging Co. vs. Minnisimmet Co., 162 Fed. 860 (C. C. A.),

was a cause of collision by a ferry boat, in Boston Harbor, with a scow which had drifted, though moored without lights. The ferry boat had no separate lookout on the bow. The court, Putnam, Circuit Judge, said, on page 861, quoting from Marsden on Collisions (5th Ed.), p. 468:

> "The duty of *ferry boats*, and of vessels

crossing the track of ferry boats, to keep a specially good lookout, has been insisted on in many cases."

He also quoted from *The Genesee Chief* and the *Ariadne*. And the ferry boat was held negligent for want of a proper lookout beside the pilot, who was

"about fifty feet aft of the bow and some twenty feet above the water.'

The Patria, 92 Fed. 411, D. C. (N. Y.), was a libel against the Patria, a steamship, for colliding with a four masted schooner off Fire Island bound to Baltimore, the steamer being bound from the Mediterranean to New York, with passengers and cargo.

Brown, D. J., said, page 411:

"There was but one seaman acting as lookout on the steamer, and he was stationed on the bridge, some seventy-five feet or more from the bow, and was also attending to blowing the whistle once a minute. (Fog.) The only other person upon the bridge, beside the wheelsman, was the mate, who was in charge of the navigation, the master having gone to his cabin for a change of clothing."

And the judge added there was

"no justification of the omission to keep a good lookout at the bow, which it has been repeatedly held should be maintained wherever possible."

And the steamer was held liable for the loss.

Further discussion of the law of lookout will be found later in the brief.

(3) *Vigilance of lookout was not interrupted.*

The interruptions of Capt. Bjerre, the pilot who was performing the duties of a separate lookout the night of the accident, were of so trivial a character as not to be entitled to any consideration. The testimony of Capt. Johnson, Capt. Bjerre and Capt. Dawe above set out, shows that the lookout that night was not subject to any more interruptions than ordinarily a lookout is subject to, who is stationed on the bow of the ship. Most, if not all, the conversations and other interruptions, related to his duties as lookout and were had in the performance of his duties as such.

At the time Johnson told Bjerre to pass the order to Dawe to go to the towing machine, it was a quarter to one o'clock (Record, pp. 317 and 318, also Record, pp. 286 and 287); the course of the vessel was changed twice after this time and at that time (i. e., when Dawe was ordered to the towing machine) there were two men in the pilot house (Bjerre and Dawe) keeping a lookout, besides Capt. Johnson (Record, p. 287). Prior to one o'clock, Bjerre on the lookout notified Capt. Johnson that he thought he discerned Duke Island, but a lookout on the bow would have done the same thing and it would have been his duty to do so, and it was perfectly proper for Johnson to

speak to Bjerre about changing his course at that time. Of course the master would consult the lookout from time to time as to points of land or lights or objects seen by the lookout. The master would have consulted the lookout wherever the latter might have been stationed. Surely it can be no neglect for the master to consult a lookout concerning his duties, obtaining information that the lookout has obtained in the performance of them. While Johnson says (Record, p. 317) that both he and Bjerre directed the movements of the vessel that night, yet the entire evidence shows that the only time Bjerre directed the movements was after the barge broke away and Johnson does not say that Bjerre directed any movements of the vessel prior to that time. At the time Bjerre and Johnson laid out the course at Tree Point, it was 11:19, after they had both determined the distance of the tug from the Tree Point light. What part Capt. Bjerre had in laying out the course is not stated, but it would appear that he merely determined with Capt. Johnson the course to pursue. This could not have had anything to do with the breaking of the shackle or the location of the tug at the time the shackle broke. It appears from Johnson's testimony (Record, p. 342), that he consulted Bjerre as to laying out the course at one o'clock, but is not sure whether he or Bjerre laid it out, but if Bjerre had anything to do with laying it out, Johnson

was on the lookout while Bjerre was so engaged. Moreover, Johnson testifies that it only took half a minute to lay out that course. It is perfectly plain that such act on Bjerre's part could have had no effect on what happened afterwards. The only courses that Bjerre had anything to do with were those laid out at 11:19 and one o'clock. He had nothing to do with laying out the course when the two point change was made, a few minutes before the shackle broke, and the evidence is that the tug ran between a quarter and a half mile after the two point change was made near the small island and before the shackle broke (Record, p. 249).

Croft says (Record, p. 71) that Capt. Bjerre gave most of the orders to him, but evidently he refers to the time after the shackle broke. Bjerre also says that sometimes the mate and sometimes Capt. Johnson gave Croft orders. The courses that Croft says Johnson and Bjerre laid out were evidently the courses at 11:19 and one o'clock, which, of course, could have no relation to the cause of the accident.

A reading of the testimony of Capt. Bjerre, Capt. Johnson and Capt. Dawe will show the alleged interruptions of the vigilance of the lookout are so trivial as to be entirely without merit (See also testimony of the last named witnesses referred to above). Reference is also made to the

findings of the court (Record, pp. 723, 731, 734, and findings above set out).

On the question of interruption of vigilance of lookout, respondent cited in the Circuit Court of Appeals some cases, but a reading of those cases shows that they are not applicable to the facts now before the court.

The George W. Childs, 67 Fed. 269 (D. C. P. A.),

was a libel against a tug for colliding with a sloop anchored in the Delaware river. The master of the tug was in the pilot house in charge of the wheel and of the navigation at time of collision, and Judge Butler said, page 271:

> "That this was not a proper lookout is clear * * * The master in charge of the wheel, and of the navigation of the vessel, was not a proper person to entrust with the duty. There should have been at least one person assigned exclusively to this duty, and stationed in the most favorable situation for seeing."

And the tug was held responsible for the collision. The case was not appealed. Judge Butler said that a custom not

> "to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect."

And he applied against the tug the presumption of her negligence when she collided with a

sailing vessel, her duty being to avoid so colliding.

Brigham vs. Luckenbach (D. C.), 140 Fed. 322,

was a libel against a steam tug for colliding with libellant schooner near Portland, Maine. The tug's captain was in the pilot house in charge, and at the time of the collision there was with him in the pilot house another man who was acting as lookout, standing at the forewindow on the port side. The court found the tug the negligent cause of the collision for not keeping a sufficiently vigilant watch on the part of the lookout who was with the captain in the pilot house. The court says on page 325:

> "The tug was going out of Portland harbor in the path of commerce, a place frequented by vessels of all kinds. She was under the duty, then, to have a lookout stationed at a point best suited for the purpose of hearing and seeing the approach of objects likely to be brought into collision."

The court then cites

The Vedamore, (C. C. A.) 137 Fed. 844,

wherein Waddill, D. J., said, page 845:

> "While it is true that no specific location on a vessel is prescribed for the lookout, it goes without saying that such location should be at the point best suited for the purpose alike of hearing and observing the approach of objects likely to be brought into collision

with the vessel upon which the lookout is located."

(In this *Vedamore* case the lookout was in the crow's nest, sixty feet above the deck and one hundred feet from the stem, the deck in front of the pilot house being crowded with a flock of sheep; and the collision happened in Chesapeake Bay where, as the court said, vessels were constantly plying, to and fro.)

The George M. Dallas, (C. C.) Fed. Cas. 5338.

The Geo. M. Dallas, a sloop, collided with the steamboat New Haven in the North River (N. Y.), which latter had three barges in tow. At the time of the collision there were, in the pilot house of the steamboat, the pilot, the captain and a hand. The U. S. Circuit Court, in affirming, did *not* say there should have been a lookout stationed at the bow, as respondent would have the court infer, for Nelson, J., merely spoke of the duty of a tug to "station a lookout at a proper place on the boat." The tug was held guilty of negligence in not avoiding a sailing vessel in crowded waters.

The Manchioneal, 243 Fed. 801 (C. C. A.) was a fruit steamer and was libeled for colliding with the pilot steamship New Jersey in Ambrose channel near New York. *The Manchioneal* had on board, at time of collision, her master and pilot on the bridge, a quartermaster at the wheel and

the first officer as lookout on the forecastle head. Judge Hough says:

> "The *New Jersey* had no one on her forecastle, and was navigated by her mate, who was personally at the wheel. Standig by him in the house was a pilot who said he was acting as lookout because the 'boys' (i. e. the hired crew of the pilot boat) were at breakfast."

The *New Jersey* sank, Hough, J., saying:

> "This finding renders it unnecessary to dwell upon the fault of bad lookout charged against the *New Jersey*. The point is mentioned only to state our opinion that by the overwhelming weight of authority it is settled that the proper place for a lookout, *is under ordinary* circumstances, *on the bow*."

The lookout on the "Commodore" was in the pilot house on the bow. The *Manchioneal* was held responsible for exceeding her lawful speed.

St. John vs. Paine, 10 How. 555 at 585, was almost wholly upon the rules and respective duties of steamers and sailing vessels approaching, etc.

City of Phila. vs. Gavaguin, 62 Fed. 617-619 (C. C. A.)

libel for collision by a tug with an anchored boat in the Delaware River, and tug held responsible. Judge Greene saying also:

> "The officer in charge of the navigation

> of the vessel is not a competent lookout, nor is the pilot house the proper place where the lookout should be stationed" (in that particular instance).

And yet he does not say the lookout should be stationed at the bow, or near the stem, but leaves the place undetermined.

There are several features which clearly distinguish

> *The Tillicum*, 230 Fed. 415, (C. C. A) 217, Fed. 976, (D. C.)

from the cases at bar:

1. The scene of the *Tillicum* collision was in Elliott Bay, in the crowded harbor of Seattle, and in a dense fog, neither of which features were present in the case at bar. His Honor, Judge Neterer, specially adverts to these two important features, where he refers to the dense fog then prevailing, and says on page 979, in 217 Fed:

> "Courts must, therefore, in a harbor where many vessels may be afloat, rigidly enforce the safety provisions of law on admiralty rules."

It is plain, then, as intimated by his Honor, Ross, Circuit Judge, on page 416 of 230 Fed., a lookout stationed on the bow of the tug *Tillicum might* have seen the steamer *Rosalie* when ten or twelve feet away and in time to avoid the collision, and these "special circumstances of the case" jus-

tified the affirmed conclusion of both courts that

> "safety of life and property requires that a tug, in towing a scow *in the manner shown*—in a dense fog, must have a lookout stationed farther forward than in the pilot house on the tug" (the location of the pilot house does not appear).

And Judge Neterer adds:

> "In a *dense fog* a short distance to the eye or ear may mean much, and a few feet might save many lives or much property."

But the crowded harbor of Seattle, and a dense fog prevailing, the two vessels blowing fog signals, and echo signals, engines being reversed, and slow movements in operation—all these features, in a critical moment, present a situation distinctly different from and wholly unlike the situation of the "Commodore" and her tow in the case at bar, where, in the open sea, with no fog, nor any "sails, rigging or spars of the" tug to obstruct the view, the lookout in the pilot house of the "Commodore" could and did see the island at least one-half mile away (as soon as it could have been seen from the bow), and hence clearly required no separate lookout on her bow. No specific rule requires a separate lookout forward on the bow, and it is only under the "special circumstances of the case" that courts have, in a few isolated instances, ruled that such separate lookout should have been stationed forward on the

bow. Indeed, common sense is the rule, and that requires a tug to have a "proper" lookout—a "competent" lookout—an "efficient" lookout—and the like—all depending on the special circumstances. Therefore, it is idle to contend that every tug, under all circumstances in all situations—must have a lookout forward on the bow, for no case can be found asserting such a broad, inflexible doctrine.

The language of Mr. Justice Clifford. in "*The Ottawa*" case concerning the "lights, sails, rigging or spars of the vessels" as obstructions to a clear view, he applies to a tug boat, though he is there using the exact words the Supreme Court applied to a large lake steamer, in *Chamberlain vs. Ward*, 21 How. 548-572, and hence is inapplicable to a tug like the "Commodore"; but neither *The Ottawa* nor the *Chamberlain-Ward* case laid down an unbending rule requiring, in all cases, a lookout forward. Further one of the chief faults of the "propeller" *Ottawa* was in failing to display sufficient and proper lights, in addition to her failure to keep out of the way of the schooner.

Now, it is to be most carefully remembered that no act of Congress or marine rule or regulation specifically requires a lookout of a tug to be stationed on the bow, and therefore, necessarily, the courts, from time to time, have interpreted those written guides, and, in some few cases have said—as in *The Tillicum*—that a look-

out should have been stationed forward near the stem; in other words, that had a lookout been at the bow, he would have been better able to see the approaching craft, but we have already seen cases where the court has said the pilot house affords a better field of view than the bow because of its elevation, and we claim that was eminently true of the "Commodore" in the case at bar, where the scene was the open sea and, unlike *The Tillicum*, there were no signals of approaching craft in a fog to require a closer scrutiny by having a lookout at the bow.

2. *The Tillicum* had a barge lashed to her side protruding twelve to thirty feet forward of the tug's bow, twenty-eight feet wide and one hundred feet long, thus presenting a double width for advancing, and requiring closer attention than did the "Commodore."

3. *The Tillicum* was already warned by the fog whistle of the approaching *Rosalie*, and the distinct fault found against the *Rosalie* was in starting ahead with locating the whistle of the tug. That was the chief cause of the collision, while the absence of a lookout forward on the bow of the tug was regarded in effect, as a likely secondary or contributing cause; for Ross, Circuit Judge, said, on page 416 or 230 Fed.:

> "Had the tug had a proper lookout, properly placed, no one can say whether, even with the bad navigation of the *Rosalie*, the

latter might not have been seen or her whistle heard by the *Tillicum*, and the collision avoided."

The key of the *Tillicum* case was disregard of actual audible warnings, and admittedly even a bow lookout on the *Tillicum* might not have been able to see the *Rosalie* in the dense fog.

This is all quite different from the case at bar, where the bald fact stands out clearly that the impending danger was *in fact* seen and heard in ample time to escape it—and it *was* escaped. The defective shackle (Findings, Record, p. 727) prevented the barge from a like certain escape.

(4) *Deck of Tug Clear of Obstructions.*

As heretofore shown, the evidence establishes that the proper place for the lookout was in the pilot house of the "Commodore," so it is entirely immaterial whether the deck in front of the pilot house was crowded or not. The tug was properly constructed. What was on the forward deck were necessary appliances located in the proper position; and did not obstruct the view from the pilot house or interfere with hearing from the pilot house.

The Vendamore, 137 Fed. 844, and the *Brigham vs. Luckenbach*, 140 Fed, 326, have already been referred to. A reading of those cases shows their inapplicability to the facts in the case at bar.

(5) *Smoke Screen.*

Capt. Bjerre says that when the vessel slowed down at one o'clock, whatever smoke nuisance there was, was practically done away with. He also says that the best place for hearing and seeing was from the pilot house, under the circumstances existing that night, from which it appears that if there was any smoke, it would not interfere with seeing and hearing so much from the pilot house as from the bow of the vessel. Bjerre was on the vessel and knows the facts in respect to this matter. The argument that the smoke interfered with sight from the pilot house, is pure speculation and is contrary to the affirmative evidence in the case.

The testimony of Capt. Snoddy and Capt. Nielsen as to the proper station for the lookout has already been referred to.

Haney vs. Packet Co., 64 U. S. 287,

which was collision between steamer and schooner in the Chesapeake Bay, p. 566 of Book 16 of L. Ed. The steamer was held responsible for violating the U. S. marine rules governing the actions of steamers as respects approaching of sailing vessels. This case holds that the proper location for lookout depends on the facts.

Chamberlain vs. Ward, 21 How. 548,

ruled on the duties of steamers in displaying their lights on the great lakes. The Court, at the end of the opinion, says:

"And in the midst of his varied duties it

is scarcely possible that he (the captain) could give his undivided attention to the special duty required of lookouts."

The Geo. W. Roby, 111 Fed. 601-602 (C. C. A.).

The lake steamer *Roby* collided with the lake steamer *Florida*, in Lake Huron in a fog. The captain of the *Roby* was on top of the pilot house, and was, in fact, the sole lookout at the time of the collision. The *Roby* was held at fault "for not maintaining a proper lookout," i. e., one whose sole duty it was to keep a vigilant and undivided watch for approaching vessels. No location is assigned for such lookout's proper position, in this opinion, and the court does not condemn the top of the pilot house as an improper place. The separate man employed as the lookout was scrubbing the deck at the time of the collision.

Each case depends on its own facts, with reference to lookout, and the ruling of the court in each case must be considered in the light of the facts of that particular case. No case has been found where, upon facts similar to those in the case at bar, any court has gone so far as to hold our lookout either not a proper one or not properly stationed. On the contrary, the cases and text books we submit show our lookout, as to station, efficiency, oneness of duty and freedom from interruption, to meet all the requirements of law under the circumstances.

While it is true that Capt. Bjerre was not ordered by Capt. Johnson to stand watch as lookout, the fact remains that Bjerre was a lookout and efficiently performed the duties as such continuously from eleven o'clock, before Tree Point was reached, until the vessel anchored the next morning at seven o'clock. Bjerre's position with the petitioner gave him a greater interest in the efficient performance of his duties as lookout, and there can be no doubt that he performed those duties with greater efficiency than any other person who could have been assigned thereto. Even admitting, for the sake of argument, that Bjerre was at liberty to go and come at will, that fact is immaterial because he did not go. There were no distractions, conversations or interruptions that interfered with the efficient performance of his duty, as is clearly shown by the testimony of Bjerre himself and of Johnson. Bjerre's testimony shows that between the time Dawe left the pilot house at about a quarter to one o'clock, Bjerre "was not marking the time down or the courses or anything else; I was keeping a good lookout and did not make any note of the time or anything like that" (Record, p. 236). "Between the time (one o'clock A. M.) the half point change was made and the time the small island was sighted (a few minutes before 1:45 A. M.), I was looking for land all the time, and if any land could have been seen, I would have seen it"

(Bjerre, Record, p. 267). Further, at page 257 of Record, Bjerre states that he kept "a very sharp lookout" from Tree Point to the time the small island was sighted. Even respondent's witness, Croft, the quartermaster, finds no fault either to Bjerre's efficiency as a lookout or to his location on the tug.

On the question of "Lookouts," *Hughes on Admiralty*, page 258, says:

> "Perhaps the most common precaution is the necessity of a lookout. Both the English and American courts have said as emphatically as language can express it that vessels must have a competent lookout stationed where he can best see, and that he must be detailed to that sole duty. Neither the master nor helmsman, if engaged in their regular duties, can act as such, for they have troubles enough of their own. A good English illustration is *The Glannibanta.*
>
> "In *Clyde Nav. Co. vs. Barclay*, the steamer which was on her trial trip, was in charge of a pilot, but an officer also was on the bridge, and there was another man, not properly qualified, on the lookout. The House of Lords held this sufficient, and that the bridge was the proper place for the lookout under the circumstances.
>
> 'The decisions of the American courts have been numerous and emphatic. In the case

of *The Manhasset*, the leading cases on the subject were reviewed, and the difference between the duties of the master and lookout clearly put. In that case a ferry boat crossing Norfolk harbor on a stormy night was condemned for having no one on duty except the master at the wheel.

"In fact, circumstances may arise where more than one lookout is necessary. Ocean steamers have been held in fault for not having two, if it appears that objects were not seen as soon as possible.

"Under some circumstances—as where a vessel is backing, or another vessel is overtaking—there should be a lookout astern as well as forward.

"This rule as to lookouts must not be carried to a *reductio ad absurdum*. If the approaching vessels see each other an ample distance apart to take all proper steps, then the object of having a lookout is accomplished, and the absence of a man specially detailed and stationed is a fault not contributory, and therefore immaterial (which fits the case at bar).

"The proper station for a lookout is where he can have an unobstructed view. It must be a place unobstructed by the sails, and is usually on the forecastle, or near the eyes of the ship.

"In the case of steamers, although courts discourage the practice of having the lookout in the pilot house, his proper location is a question of fact, not of law. The dissenting opinion of Chief Justice Taney in the case of *Haney vs. Baltimore Steam-Packet Co.*, well puts the doctrine as follows:

" 'It has been argued that the lookout ought to have been in the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court may always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed, and the hazards she is likely to encounter; and must, like every other question of fact, be determined by the court upon the testimony of witnesses,—that is, upon the testimony of nautical men of experience and judgment. It cannot in the nature of things, be judicially known to the court as a matter of law.'

"The courts have ruled that this doctrine applies to all steamers, large and small, both

as to location of the lookout and the necessity of having a man independent of the master and wheelman. In the case of tugs it is a rule more honored in the breach than in the observance. There is some excuse for it, as *the pilot house of the tug is so far forward and so elevated as usually to afford the best view.* And, in addition, the stem of a tug being low down in the water, unlike the lofty stems of large vessels, is so wet a place in a heavy sea that a lookout could do no good. Hence the courts, though insisting on their rule even as to tugs, especially in *harbor work*, and requiring strong proof to satisfy them that the want of a special lookout did no harm, are yet more lenient in such cases than in cases of large steamers. The instances in the books where tugs have been condemned in this respect were cases where the accident was *directly traceable to such neglect.*"

In the two cases of

City of Philadelphia vs. Gavagnin, 62 Fed. (C. C. A.) 67, and

The Geo. W. Childs, 67 Fed. 271 (collisions with anchored vessels),

the thickly traveled Delaware River was the scene of each accident and in each case the mate was in the pilot house acting as lookout while in charge of the wheel, and they illustrate the above reason-

ing of Taney, C. J., i. e., that in such crowded thoroughfares prudence may require that the mate should not have also the duties of a lookout. In the *"George W. Childs"* case, the court, on page 271, expressly admits the failure to maintain a lookout might not have been the cause of this accident, and that the proof as to the exact cause is not clear, and he then applies the artificial presumption in such cases against tugs. This case, then, is not an authority for respondent. In the following five cases cited in Hughes (page 266), viz.:

The Cairo; The Bendo; The R. R. Kirkland; The Blue Jacket; The Hercules;

the hard-and-fact "exclusive lookout" theory was wholly ignored, and common sense prevailed. Thus, in

The Cairo, 23 Fed. 734,

Judge Benedict said, page 735:

> "Under the circumstances it was not negligence to station the lookout in the pilot house of the tug."

Brady vs. The Bendo, 44 Fed. 439,

the court, Hughes, J., said, on page 444:

> "The proper place for a lookout on any vessel is that point from which he can best see objects and obstructions. The courts do not undertake to determine the place by any general ruling. A good place on the deck of one vessel may not be the proper place on

another vessel of different conformation. The pilot house deck of a steam tug is the most elevated place on the tug; and the pilot house itself, having windows on every side, is not an improper place for a lookout to enter occasionally in performing his observations."

And the tug was held not in fault for not having a separate lookout.

The R. R. Kirkland, 48 Fed. 760,

a steam tug, collided at night in an open sea with a schooner, and was held responsible, though Hughes, J., said, on page 762, in speaking of the lookout:

"He ought to be at such moment just where he can best make proper observations as a lookout at that moment, whether it be in or out of the pilot house. I am inclined to think, from the evidence in this case, that the pilot house is as good a place for observation as any in a steam tug; and shall not rule that Daniels, the lookout here, was at fault from the mere fact of being there in this instance."

He adds, he follows his ruling on this point laid down by him in

The Kallisto Case, 2 Hughes, 142, 14 Fed. Cas. No. 7600 (1877) (D. C.),

which was the case of collision in the open sea between two sailing vessels.

The Blue Jacket, 144 U. S. 371, 12 Sup.

Ct. 711, 36 L. Ed. 469, annotated 15 Roses notes 1197.

A steam tug with tow, and a sailing vessel, collided in Straits of Juan de Fuca, at 2:00 A. M., and the tug was held, not at fault. The court per Blatchford, J., said on page 718:

> "If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequence of the collision; *and the exemption of the tug necessarily results from the finding of a fact that the absence of the proper lookout in nowise contributed to the collision.*" Finding of Fact 25 was:
>
> "That said steam tug *Tacoma* had no such lookout as is required by law, but this fact in nowise contributed to said collision."

(Such was the finding in the case at bar.)

This point—that of the absence of lookout is immaterial where it did not contribute to collision—is ruled and "*The Blue Jacket*" cited thereon, approved, and followed in the following cases:

The Nettie Quill, 124 Fed. 671 (D. C.) (not appealed).

The George Dumois, 153 Fed. 835 (C. C. A.).

The Somers N. Smith, 120 Fed. 574.

The Pilot Boy, 115 Fed. 875 (C. C. A.), holding steamer having no lookout other than pilot

not liable for collision with schooner which changed her course.

Also in

The Elk, 102 Fed. 698 (C. C. A.),

Vernon vs. International S. S. Co., 79 Wash. 22, at p. 26,

in which in an action for injuries to plaintiff's steam vessel by colliding with defendant's steam vessel in fog, it was ruled that the question whether failure of plaintiff's vessel to have a lookout was the cause of collision was a question of fact for the jury. And Main, J., said, on page 26:

> "A fault which produces no ill consequences will be regarded as immaterial,"

citing "*The Blue Jacket*," and other cases, one of them being

Meyers, etc., Co. vs. The Emma Kate Ross, 41 Fed. 826 (D. C.); affirmed in 46 Fed. 872 (C. C.); and in 50 Fed. 844 (C. C. A.),

the District Court, Green, J., saying, on page 829:

> "Nor is there any pretense that the collision could be in any wise attributed to the absence of a lookout. A fault which has no ill consequences is immaterial."

The Blue Jacket, 144 U. S. 371, 36 L. Ed. 469, at p. 478,

the court, Blatchford, J., said:

> "If the collision does not result as a con-

sequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision, and the exemption of the tug necessarily results from the finding as a fact that the absence of the proper lookout in nowise contributed to the collision."

The Annie Lindsley, 104 U. S. 184, 26 L. Ed. 716,

wherein, at page 718, the court, Wood, J., said:

"Neglect of the lookout does not appear from the findings to have had any part in bringing it (the collision) about. It would be against all reason to hold that the owners of a vessel whose lookout was shown to be negligent, should be made liable for the consequences of a collision, when the neglect of the lookout had nothing to do in causing it." (Citing),

The Farragut, 10 Wall. 334, and

The Fannie, 11 Wall. 238, and especially

The Nacoochie, 137 U. S. 330, 34 L. Ed. 687,

which ruled that it is no fault in a schooner, in a fog, that she had only one lookout, where the absence of another lookout did not contribute to the collision, and where the one lookout properly discharged the duties of a lookout and blowing the fog horn. On page 691, Blatchford, J., in delivering the opinion of the court, said:

"Nor is it found that he could have performed the duties of a lookout better than he did, or that any different manner of performing those duties, either by him or an additional lookout, could or would have made any difference in the result, or that the steamer would or could have been seen by the schooner any sooner than she was seen. * * * Under all these circumstances, and in view of the actual findings, it cannot be held that there was any lack of vigilance on the part of the schooner in the matter of a lookout." (Citing),

The Farragut, The Fannie, The Annie Lindsley.

The case of the *Tillicum*, 217 Fed. 976, affirmed in 230 Fed. 415, is not an authority against the petitioner when considered with reference to the facts in the case at bar. The *Tillicum* case was one of collision between two vessels, which occurred in the harbor at Seattle, as is shown by the remark of the lower court as follows:

"Courts must, therefore, *in a harbor* where many vessels may be afloat, enforce the safety provision of the law on admiralty rules."

As above shown the *Tillicum* case is not applicable to the case at bar.

In the valuable Brief of counsel for Petitioner in *The Blue Jacket* case are cited *inter alia*,

The S. B. Wheeler, 87 U. S. 385, 22 L. Ed. 385,

in which the court, by Waite, C. J., said on page 385:

> "It is, indeed, urged that the claimants, by their own proof established the fact that there was no lookout at the bow of the *Wheeler* when the collision occurred. This is so, but whether that was a contributing fault, was a question of fact, and that has been twice found against the appellants."

Also

The Dexter, 90 U. S. 23 Wall. 69, 23 L. Ed. 84,

which ruled that where the want of a lookout did not contribute to the cause of the disaster, the vessel will not, on that account, be held responsible.

Also,

The General Franz Sigel, 6 Benedict 550, Fed. Cas. 5311, and

The Mary T. Wilden, Taney, 567, Fed. Cas. 2965,

each of them relieving the vessel of responsibility for want of a lookout, as that want was not contributory to the disaster.

And in this connection it is important to remember that the record in the case at bar does not contain a finding by the lower court that a separate lookout on the bow of the "Commodore"

would, or might, or could, have in any way avoided the accident to the barge and it was distinctly ruled in

Sun Mutual Ins. Co. vs. Ocean Ins. Co.,
107 U. S. 485, 27 L. Ed. 337,

that where a fact is necessary to create liability and does not appear in the findings of fact, it is treated as not proven.

The findings of the lower court regarding lookout have been referred to in a previous part of this brief, from which it appears that the court distinctly found that the "Commodore" had a proper lookout properly stationed.

In following *"The Blue Jacket"* case, in

The Pocomoke, 150 Fed. 193 (D. C. unappealed),

the court said, on page 197:

> "An additional or special outlook would have served no good purpose. * * * All the law requires as to a lookout is that there shall be some one properly stationed to best observe, see, and hear the approach of vessels," citing, *inter alia*,
>
> *The Farragut*, 10 Wall. 334, 19 L. Ed. 946,

wherein Bradley, J., said, page 947:

> "A lookout is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service. * * *

> In the case before us no lookout could have been of any possible advantage. * * * It is perfectly evident that the absence of a special lookout had nothing at all to do with the happening of the accident, and, therefore, it can have nothing to do with fixing the liability of the parties."

And the tug was held not at fault.

Also citing

The Bermuda, 17 Fed. 397,

wherein the court, by Brown, J., said on page 398:

> "The tug was at the time in charge of her captain, who acted as pilot, and there was no other lookout either forward or aft."

And the tug was held not liable, because, on the facts, the absence of a special lookout in no way contributed to the collision.

Also citing

The George Murray, 22 Fed. 117 (D. C. not appealed),

in which the court, by Blodgett, J., said, on page 122:

> "The rule is fully settled that the precaution of a lookout is not indispensable when, from the circumstances, a lookout could not be of service, or when the officer of the deck is in full possession of all the information a lookout can possibly give."

And the absence of a lookout was held not enough to fasten liability on the steam vessel.

The master of the "Commodore," as well as her lookout, saw the small island when *one-half mile from it*, and it was seen as soon as it could possibly have been seen from any point on the tug.

The Hercules, 80 Fed. (C. C. A.) 998, reversed 70 Fed. 334,

the lower court said:

> "The tug's lights were in place and burning. Her master was in the pilot house, in charge of her navigation, and at the same time blowing her fog whistle, *and acting as lookout on the starboard side of the tug.* A foreign-born young man was at the wheel, obeying the directions of the master. The fog was thick."

The tug at eleven o'clock in the night time ran into and sank a sailing schooner which was not provided with a mechanical fog horn. The lower court held that the tug was at fault for not standing by and rendering assistance to the schooner, saying:

> "The tug was in fault in failing to stand by the schooner after the collision, as well as in other particulars not material to the decision of this case. The schooner was in fault in not having had on board and in not using a proper mechanical fog horn. * * * Both of these colliding vessels having been at fault, the damages resulting from

the collision and the sinking of the schooner must be divided equally."

The tug appealed and the Circuit Court of Appeals reversed the decree as to the tug, saying (80 Fed. p. 999):

> "Nor is it clear to us that there was any failure on the part of the tug to keep a proper lookout or in giving the proper signals. The testimony in her behalf was that everything was done that ought to be done. The court below, which had the advantage of hearing that testimony, has not found her at fault in either particular."

The tug was exonerated.

The Supreme Court denied a petition for writ of certiorari, *sub nomine.*

> *Crossley vs. Geo. Taylor, Master, etc.*, 168 U. S. 710, 42 L. Ed. 1212.

The testimony in the case at bar was that everything was done that ought to be done (Record, p. 265).

The case of

> *Clyde Navigation Co., Appellants, vs. Barclay, et al., Respondents*, 1 Appeal Cases (May 30, 1876) 790.

The respondent's ship *"Colina"* of 2001 tons burden, while on a trial trip on the Clyde, ran into appellants' dredger moored in the river. This suit for 6000 pounds follows.

The by-laws made for the navigation of the Clyde provide:

> "Every vessel shall during the daytime, have one person, and from sunset to sunrise, or in time of fogs, two persons properly qualified, stationed at the bow as a lookout, to give notice in due time of any obstruction or danger. * * *"

It was claimed by appellant in that case that the "*Colina*" did not have a proper lookout properly stationed. The court, denying that contention, said:

> "I do not know whether the words 'stationed at the bow' point to anything different from being stationed on the bridge, but in this case the evidence makes it quite clear that the proper place for the lookout was on the bridge; and as a matter of fact, the evidence is that the accident occurred during the daytime, when, according to that by-law, one person only would be sufficient for the lookout, for there was plenty of light, and no fog; there was one person, the pilot, and another person, Durie, who practically acted as officer, on the bridge the whole of the time, to say nothing of a third person, Ferguson, whom I will mention presently, who was there, too, but who may not perhaps have been properly qualified. But that the pilot and Durie were properly qualified

for the purpose is perfectly clear; they were in the proper place during the whole time. * * * Therefore, it seems to me that the by-law, at all events, was duly complied with in this case."

The case of

Henry C. Rogers, et al., vs. The Schooner "S. B. Wheeler," et al., 20 Wall. 385-6, 22 L. Ed. 385,

was one in which libellants sought to recover for the loss of the schooner *"Beebe,"* by a collision with the *"Wheler."* A decree having been entered dismissing the libel and affirmed, on appeal, by the Circuit Court, the libellants appealed to the Supreme Court. The latter court said:

"Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here. * * * It is, indeed, urged that the claimants, by their own proof, established the fact that there was no lookout at the bow of the *Wheeler* when the collision occurred. This is so; but whether that was a contributing fault, was a question of fact, and that has been twice found against the appellants. We are entirely satisfied with the findings. The judgment of the Circuit Court is affirmed."

The lower court in the case at bar found that the sole cause of the accident was the breaking

of the barge's shackle and that the absence of a lookout at the bow of the "Commodore" did not contribute to the accident.

Rogers vs. The S. B. Wheeler, supra, was followed in

The Sabine vs. The Richmond, 103 U. S. 542.

Smith vs. Burnett, 173 U. S. 430, at 436.

The Iroquois, 194 U. S. 240, at 247.

The S. S. Wilhelm, 59 Fed. 169, at 170 (C. C. A.).

And on finding of one lower court.

Last Chance Min. Co. vs. Bunker Hill, etc., Co., 131 Fed. 579, at 587-8 (C. C. A.).

As to lookout we contend:

1. That there is no evidence to make a *prima facie* showing of negligence regarding the lookout or his station.

2. The circumstances were not such as to require a lookout at the bow of the tug.

3. That the pilot house, windows open, was the best place on the tug to see and hear. On this we submit the evidence is clear and convincing and leaves no doubt. If it was the best place, then the most strict application of the rule has been met.

4. The evidence shows that the lookout, stationed in the pilot house, could see and hear more

efficiently from the pilot house than from any other part of the ship.

5. That there was a proper lookout maintained in the pilot house.

6. That the findings of the District Court, on the evidence, are conclusive.

7. That the pilot and also the master saw the island half mile away before the shackle broke, which is all any lookout, wherever stationed, could have done.

V.

The Damage to Barge and Her Cargo Was Not Caused or Contributed To by the Absence of a Lookout.

(1) The Court's Findings:

Neither the tug nor barge would have been in dangerous proximity to the small island had the shackle not broken. The barge drifted into the island only after its shackle broke and if it had not broken the barge would have followed the tug in perfect safety. The tug very nearly piled up on the island but this was after the shackle broke and after the tug had spent considerable time *trying to reach the barge.* The court found that if the shackle had not broken the barge would not have been damaged, and further,

> "Now, in the case at bar the absence or inefficiency of such lookout as libellant contends should have been had, did not cause any collision,"

(Record, p. 732), and that there was no actionable negligence on the part of the tug (Record, p. 734). The plain meaning and intent of the finding is that Bjerre was a proper and sufficient lookout properly stationed; that there was *no neglect whatever* in respect of lookout and therefore no room for the application of the rule that in collision cases the absence of a proper lookout properly stationed raises a presumption of neglect, subject to explanation. Respondent claims that the court in arriving at its findings assumed that the burden was upon him. We think there is no doubt that the burden *was* on him. That burden never shifted, first, for the reason that the respondent did not make out a *prima facie* case by showing the lack of a proper lookout properly stationed and because this is not a case for the application of that rule, it not being a case of collision with another vessel. Furthermore, if that rule has any application and if the burden of proof shifted to the petitioner, it introduced evidence to show that the accident was not caused or contributed to, either by an improper lookout or because he was not properly stationed. The court found upon the evidence that the accident was not caused or contributed to, either by the inefficiency of the lookout or because he was not properly station.

(2) The burden of proof:

It is true the tug in proceeding from Tree Point

to Mary Island got off her course, but she did not approach dangerously near the small islet on the east shore of the mainland until a considerable time after the shackle broke, and she approached near the small island *only* in her endeavors to put a line aboard the barge and to rescue her from danger; it was the accident to the barge that caused the tug to be put in danger and had not the defective shackle broken the tug would never have approached close to the island nor would it have been necessary for the tug to port her helm to avoid the island. Respondent's contention that the small island was not discovered until the tug was about into the breakers is based solely upon the testimony of Croft, witness for respondent, but his statements are flatly contradicted by Bjerre and Johnson, both of whom testify that the small island was in sight when the tug was at least one-half mile away from it (Record, pp. 133, 134, 267, 257, 317); also by mate Dawe. And as above shown the testimony set out under the title "lookout" shows that the island was seen as soon as it was possible to discover it. The claim that when the wheel of the tug was put hard a'port an excessive strain was put on the towing device, thereby parting the shackle, is also based upon the testimony of Croft, but the testimony of Bjerre, Johnson and Dawe is to the effect that at the time the helm was put hard a'port the barge was not attached to the tug, the shackle

having broken before that time. If the shackle was broken and the barge adrift at the time the helm was put hard aport then, of course, such parting of the helm could have had no connection with breaking of the shackle. In this connection respondent claims that the shackle was the weakest link in the towing device. This device has already been described herein. Later on it will be shown from the testimony that this shackle instead of being the *weakest* of the three links in the towing device *would have been much the strongest one had it* not been for its *defective condition* brought about by use or other causes chargeable to the respondent.

At this point it may be well to describe the movements of the tug from the time it left Tree Point until after the shackle broke. Tree Point was reached at 11:19 p. m. (Record, p. 328). The course was set at NW½W, compass course (Record, pp. 273, 328). The vessel proceeded on this course at the rate of seven and a half or eight knots per hour until one o'clock a. m. (Record, pp. 313, 233), at which time Bjerre, the lookout, saw land which he believed to be Duke Island. He called Capt. Johnson's attention thereto and at that time the course of the vessel was changed half point to the north, that is the course was changed to NW, compass course (Record, pp. 328, 273, 234). The vessel proceeded on the NW course until a few minutes before 1:45 a. m., at half

speed, which was five knots per hour (Record, pp. 234, 235, 312, 313, 320, 329). Johnson says that a few minutes before 1:45 a. m. "we seen a small island ahead of us and we ported our helm two points to clear the island, and a few minutes after that the barge's shackle parted" (Record, p. 312). A similar statement is made by Bjerre (Record, p. 235). The helm was ported two points when the tug was one-half mile from the small island (Record, pp. 234, 237, 255). Dawe also noted the change of course at this time (Record, p. 379), and the parting of the shackle a few minutes afterward (Record, p. 379).

At 1:45 a. m. the barge broke away (Record, p. 329). After the barge broke away, and after the tug had taken in its tow line in order to prevent it fouling its propeller, the tug made several endeavors to pass a line to the barge, but was unsuccessful (Record, pp. 318, 236-7), and finally at 7:35 o'clock a. m., the same morning of the accident, the tug anchored (Record, p. 329).

The testimony of Croft (Record, pp. 68-93), is contradicted by Johnson and Bjerre. Both of them testified that the shackle had broken and the barge was adrift before Bjerre took the wheel from Croft, the tug maneuvering to put a line aboard the barge at the time Bjerre took the wheel from Croft in order to prevent the tug from running into the breakers near the island. Croft testified that Capt. Johnson was not in the pilot house at the time the shackle broke, but both Bjerre and John-

son testified that Johnson was there (Record, pp. 231, 317), and had not been out of the pilot house since about 11:30, when he went aft to put the towing machine in action (Record, pp. 232, 235, 317). Croft also says that at the time the shackle broke, Dawe was in the pilot house, but Johnson, Bjerre and Dawe contradict this statement (Record, pp. 317-318, 379, 275). Dawe was at the towing machine (Record, pp. 235, 379, 318). It is not improbable that when the shackle broke, Croft asked Capt. Bjerre what had happened, and it is not improbable that Bjerre answered that the tow was lost, and it is not improbable that Bjerre told Johnson that the tow was lost, but that is immaterial and not in issue in the case. If there is a failure on Bjerre's part to deny that Croft asked him if something had happened, that failure does not in any way corroborate Croft's testimony, because Bjerre's testimony and Johnson's, as well, contradict Croft's version of the facts before and after the breaking of the shackle. The Court found (Record, p. 724) that Croft was mistaken in his version of the facts preceding and after the breaking of the shackle and found that Capt. Johnson, Capt. Bjerre and Capt. Dawe stated the actual facts.

The lower court made no intimation at the time the motion to dismiss was made at the close of Respondent's case, or at any other time, that the respondent had made out a *prima facie* case. The motion to dismiss was not argued and was

denied by the court without comment, under the well established rule that in admiralty cases no dismissal will be granted even though a libellant has not made out a *prima facie* case, unless claimant also rests.

In Benedict's "Admiralty" (4th Ed.), Par. 461, it is said:

> "A motion to dismiss at the close of libellant's case is ordinarily not entertained unless claimant also rests" (citing in note 6).
>
> *The Persiana*, 158 Fed. 912 (D. C. not appealed).

In that case libellant having rested, claimant moved to dismiss on the ground that libellant had not affirmatively shown that the injury was caused by the ship's negligence. This motion was denied and afterward claimant rested without offering evidence, and the case was fully argued by counsel. Hough, D. J., said:

> "It has been the uniform practice of this court not to entertain motions to dismiss at the close of libellant's case, unless the claimant or respondent also rests. If the party defendant considers that any testimony is necessary to overcome that offered by libellant, it should be produced, and the court not asked to dispose of the litigation before all the testimony is submitted. The libel is dismissed."

And as to the danger of a successful motion to dismiss, see

Bull vs. N. Y., etc. Co., 167 Fed. 792 (C. C. A. 2d Circuit),

in which case syllabus 2 reads thus:

> "It is the well settled practice in the admiralty courts for both parties to put in their evidence before the case is submitted to the court for decision; and where a motion to dismiss the libel, made by respondent at the close of libellant's evidence, is sustained, and the decree is reversed on appeal, the case will not be sent back for a new trial, but a decree will be directed for libellant."
>
> "Admiralty," Cent. Dig., Par. 776; Dec. Dig., Par. 119.

The Court said, page 794:

> "We have no intention of sanctioning the common law practice of sending causes back for a new trial, only to see them reappear again with a longer record, more or less modified from what was first presented." (Decree reversed.)

Respondent seeks to place a very narrow construction upon the findings of the court, which we think, is entirely unjustified. A reading of the findings most clearly indicates that the court intended to, and in fact did, find affirmatively against the respondent upon every material issue of fact in the case.

Respondent contends that the barge would not have avoided the collision with the island even if the shackle had not broken. The court, however,

found that the barge would have avoided the island had the shackle not broken (Record, p. 732). The findings of the court in this respect is based upon the clear preponderance of the testimony.

Capt. Harriman, with diagram, Exhibit 29, Rec. p. 470;

Capt H. R. Smith, Rec. p. 220; and diagram, Exhibit 21, Rec. p. 221;

Capt. Jacobsen, Rec. p. 587; with diagram, Exhibit 3 with Depositions, Rec. p. 588;

Capt. Bjerre, Rec. pp. 255, 256, with diagram, Exhibit 22, Rec. pp. 256, 276;

Capt. Johnson ,with diagram, Exhibit 35; Rec. pp. 331, 332;

Capt. E. W. Smith, Rec. pp. 607, 608, 613;

Mate Dawe, with diagram, Exhibit 27, Rec. pp. 382, 383;

Respondent claims that the testimony of said witnesses in respect to whether or not the barge would have avoided the island had the shackle not broken, was not predicated upon the *tug's proximity to the small island, as testified to by Croft,* as *almost in the breakers.*

But Capt. Bjerre says that if the shackle had not broken the barge would not have gone ashore (Record, p. 272); if the helm of the tug had been put hard aport so as to cause the tug to take a course at right angles to her former course the barge would not have gone so close to the small island as the tug did even if the barge did not port

her helm (Record, pp. 255 and 256). This testimony applies whether the tug was "almost to the breakers" of the small island, or half a mile therefrom. The proximity of a "large rock 200 or 300 yards in diameter" would not, of course, have any effect on the course of the barge in case the tug had put her helm hard aport. Respondent did not see fit to cross-examine Bjerre on this point nor introduce any evidence on it. Capt. Johnson's testimony, and Dawe's, on the point is similar to Capt. Bjerre's (Record, pp. 331, 332). Dawe has observed such movements (pp. 382-3). Capt. Jacobsen's testimony is to same effect, assuming the tug to be close to the small island, under the condition existing at time of accident (Record, pp. 587, 588). Capt. H. R. Smith says the barge would have cut "the corner" and not go so close to the island as the tug did (Rec. pp. 220-1); with the tow line 180 fathoms in length, Capt. Harriman says that he has made right angle turns "lots of time" and that the barge makes a smaller circle than the tug, following the bight of the hawser in the water (Record, p. 470), while Capt. E. W. Smith said that the barge would go outside the circle made by the tug; he did not say how much, nor did he say that the "Bangor" would have struck the island even if the tug while "near the breakers" had made the 90 degree turn; he did not have reference to a tug with a towing device.

Capt. Snoddy seemed to think the barge, on a

90 degree turn of the tug, would go outside the circle of the tug, but *he never made a turn of that kind* (Record, p. 660).

The great weight of the evidence was that the tug having escaped the island, the barge would likewise have escaped had not the shackle broken, under the conditions of proximity to the island as given by Croft and of prevailing wind and sea, and the court found such to be the fact (Record, p. 732).

But the conditions as given by Croft, viz., that the tug was close to the breakers at the time the helm of the tug was put hard a'port and that the barge had not then broken adrift *did not exist*, and the court so found (Record, p. 724). The barge broke adrift a few minutes after the two point change in course was made (Record, pp. 312, 235); the two point change was made when the tug was one-half mile from the island (Record, pp. 237, 255); between the time of the two point change and the time the shackle broke the tug and barge had gone on course NNW between one-quarter and one-half mile (Record, p. 249); had the tug proceeded on her course after the two point change had been made both the tug and barge would have cleared the island by between one-quarter and one-half mile (Record, p. 255); the shackle broke when the tug was between one-quarter and one-half mile from the island (Record, p. 255), and the barge was 1080 feet behind the tug and necessarily further from the island

than was the tug. Had the shackle not broken the barge would not have come any closer to the island than the tug would have come, between one-quarter and one-half mile (Record, p. 255), which was a perfectly safe distance (Record, p. 255); in fact the barge would not have gone so close to the island as the tug would have gone (Record, pp. 257, 331). The testimony of all the witnesses who testified on the point agrees with the testimony just mentioned. So it was not necessary that evidence of the course of the barge on a change of course of the tug should be based on Croft's theory of the proximity of the island, *because no such condition existed.*

Bjerre's testimony is given above to the effect that from the starboard window he saw the small islet when it was half mile ahead (Record, p. 234). As soon as he saw it he notified the master who changed the course of the vessel two points (22½ degrees) to the east; that is, the vessel's compass course was changed from NW to NNW (Record, p. 235); this was when the tug was one-half mile from the island (Record, p. 237); a few minutes thereafter the shackle broke (Record, p. 235); and the tug then turned round to assist the barge (Record, p. 236); while thus going to the assistance of the barge and being intent on saving her the tug ran close to the islet, and then it was that the wheel was put hard a'port (Record, p. 237), and the court so found (Record, p. 724).

Of course the tug drew nearer to the small island, in proceeding on her course after the two point change was made, because when that change was made the island was one-half mile *ahead* of the tug, and thet wo point change was made so as to pass between one-quarter and one-half mile to the *east* of the island. The barge would not have gone so close as the tug because the barge was 1080 feet farther away, and farther to the east of the island than the tug was at the time of the two point change of course. When the tug sighted the small island it was on a compass coures *NW*, so the tug and barge were *southeast* from the island and necessarily the barge was 1080 feet farther southeast from the island than was the tug, and hence *farther away*. With only a two point (22½ degree) change the barge would have passed the island farther east than the tug would have passed it, or at least as far east, and that is shown by the testimony of the witnesses with their diagrams (Exhibits 29, 21, 3, 22, 35, 27). Respondent's claim that the tug was "almost in the breakers," etc., is based wholly on Croft's theory, and contrary to the fact.

The barge drifted to the south of and past the small island; at the time the shackle broke the tug was between one-quarter and one-half mile east of the small island and the barge was about 1,000 feet to the south of the tug.

After the shackle broke and while the tug was waiting to take in the long hawser and making

the various circles and maneuvers to get to the barge, the latter, under her momentum, and driven by the 30 mile, or more, gale from the southeast, and set by the tide and perhaps currents, in a northwesterly direction, she drifted in a northwesterly direction in to the shore.

But for the breaking of the defective shackle the barge would not have gone ashore and it is submitted that the District Court was clearly right in that finding.

VI.

The Wheel of the Tug Was Not Put Hard Aport Until After the Shackle Broke. But Even if the Tug Had Turned Abruptly Before the Shackle Broke, Such Turn Would Not Have Been Negligent.

Respondent argues that the tug's wheel was put hard a-port before the shackle broke and contends that the court made no finding affirmatively in favor of petitioner that the wheel of the tug was not put hard a-port before the shackle broke or that it was not negligence under the circumstances presented by the evidence to turn the tug abruptly.

A reading of the findings of the District Court will show that the court did find affirmatively that the wheel of the tug was not put hard a-port before the shackle broke, and also that it was not negligence to turn the tug abruptly, even if the abrupt turn had been made before the shackle

broke (see the court's findings on both of these points, Record, pp. 724 to 728).

The court (Record, p. 724) said: "Did the tug put the wheel hard a-port before the shackle broke?" This question the court then answered *in the negative.* The court further on (Record, p. 725) said:

> "But assuming that the tug did 'hard aport' immediately before the shackle broke, was such action without warning to the barge? * * * It is clear that the failure of the tug to blow a whistle on porting her helm, if she did port her helm before the shackle broke, was negligence causing the casualty" (Record, p. 726).

On page 727 of the Record, the court said:

> "Still I cannot find as a matter of law, nor can I find as a matter of fact from the preponderance of the evidence, that it was negligence under the circumstances here presented to turn the tug abruptly and to fail to sound a signal for such turn. * * * The tug escaped, and if the barge had followed the tug, it would have escaped. It did not follow the tug, because the shackle broke. The shackle broke because it was not strong enough to stand the strain. I am satisfied from the evidence that negligence cannot be ascribed to the tug for its action or non-action at or about the time the shackle did break" (Record, p. 728).

The only evidence the wheel was put hard a-port before the shackle broke is that of respondent's witness, Croft, but as heretofore shown, the testimony of Bjerre, Johnson and Dawe is directly to the contrary.

Bjerre (Record, pp. 234, 235, 236, 237, 238, 249, 253, 255, 265, 268, 272, 292).

Johnson (Record, pp. 312, 316, 317, 327, 344).

Dawe (Record, pp. 379, 381, 388, 396, 401, 409, 412).

Dawe was not in the pilot house at the time the shackle broke (Record, p. 318), but Capt. Johnson was in the pilot house (Record, p. 317, 231, 379).

Perhaps, as Croft says, Bjerre did tell him to "ease her up, ease her back again; steady, steady." But if that remark was made by Bjerre, it was after the shackle broke and after the turn had been made by the tug to prevent it running into the breakers near the small island. If Croft saw any mist on the water that looked to him like wash on the rocks, it was at the time the helm of the tug was put hard a-port to prevent running into the breakers, but this was after the shackle broke. If Croft asked Bjerre what had happened, and if Bjerre said: "Yes, we lost the tow," that is no evidence as to whether the wheel was put hard a-port before the shackle broke, because that question, if asked at all, was asked before the tug's helm had been put hard a-port at the time it

was endeavoring to put a line aboard the barge. Croft's statement that Capt. Johnson then came in and Bjerre reported and said: "Damn it, we lost that damned tow," cannot be true, because Johnson at the time the shackle broke was already in the pilot house. It is possible that Bjerre said to Johnson that the tow had carried away, but that does not bear on the question as to whether the tug's wheel was put hard a-port before or after the shackle broke. Respondent has not denied that Croft's testimony was contradicted by Johnson and Bjerre. Croft's testimony (Record, p. 70), is to the effect that no signals were given from the pilot house to the engine room between midnight and the time the shackle broke, but in this he is flatly contradicted by Bjerre, Johnson and Dawe, and Chief Engineer Smith, of the tug. The signals were given to the engineer to slow down the tug and the tug was slowed down at one o'clock (Record, pp. 319, 380, 381, 234, 368, 369).

We cannot agree that the testimony of Foster (Respondent's master of the barge) corroborates Croft or contradicts Bjerre, Johnson and Dawe. It is conceded that at the time the shackle broke, Foster was in the hold of the barge, lying in bed. If, as Foster says, the wheel of the *barge* was put hard over, that might have been the cause of breaking the shackle. It is possible that Foster, lying in bed in the darkness of the hold of the barge, might have noticed the sudden slowing up

in the speed of the barge after the shackle broke, but that proves nothing except that the shackle broke. Foster claims that he went on deck a minute or a minute and a half after feeling the jar (Record, p. 56), and saw the surf at the small island, and that when he first saw the little island, it was 500 or 600 feet from the barge. It will be remembered that the tug sighted the island when half a mile away; that the tug ran between a quarter and a half mile after it sighted the island and before the shackle broke. If the tug ran a half mile, then she would be abreast of the small island when the shackle broke and the barge would have been 1080 feet south of the island and between a quarter and a half mile east of the island. By the time Foster got on deck, the momentum of the barge, the wind which was blowing northwesterly at the rate of thirty or more miles per hour, and the tide setting in a northwesterly direction, had, of course, set the barge closer into the island than it was at the time the shackle broke. Foster may be mistaken as to his coming on deck a minute and a half after he felt the breaking of the shackle, and he may be mistaken as to the distance the barge was from the little island at the time he saw it. In judging the distance, he is merely expressing an opinion, but whatever it is, his testimony is directly contradicted by Bjerre and Johnson and Dawe. Foster admits that at the time he says he saw the little island, after coming on deck, the tug had already put her helm

hard over, and was making a circle to get back on the same course she had come up and that she was then a couple of cable lengths from the barge (Record, p. 56). All of which shows that if he saw the small island when the barge was 500 or 600 feet away much more than a minute and a half had elapsed between the time the shackle broke and the time he saw the little island, because after the shackle broke, the tug slowed down and took in its tow line, which took five minutes (Record, p. 401), and, of course, it took considerable further time to make the first turn so that the tug could get down close to the barge. The evidence is that the tug made two or three circles in her attempt to reach the barge, and it does not appear from Foster's testimony whether the time he saw the tug making the circle, it was the first or second or some other circle that the tug was making; but whether it was the first circle of the tug that he saw or a later one, it is quite plain that it was much more than a minute and a half after the shackle broke, during which time the barge had naturally drifted.

Respondent has claimed that Johnson's testimony corroborated Croft as to the distance the tug was from the little island at the time the shackle broke. We do not believe there is any justification for this contention and the lower court evidently did not consider there was, because it found against the appellant and held that the shackle did not break at the time the

helm of the tug was put hard a-port. It will be remembered that the tug had not picked up the Mary Island light at the time the shackle broke, nor had it picked up the Mary Island light at the time the two point change in the course was made a few minutes before 1:45. The tug was endeavoring to pick up that light and by turning the light on in the pilot house to enable the master to record in his log book the two point change would detract from the ability of the lookout to pick up Mary Island light or other objects and the master thought it advisable to take every precaution and to do nothing that would affect his ability, or that of the lookout, to avoid accident. It is evident from Johnson's testimony, that that was what Johnson had in his mind, because, in explanation of the reason why he did not put down the two point change in course, he says that

> "we were getting too close to the island at that time, and I thought I would let it go until we got to Mary Island light and I would put them both down together, but I got the time. * * * I was going to put it down when we came to the Mary Island lighthouse; it was dirty and I didn't want to keep the electric light on in the wheelhouse too long. * * * I got the time, I turned on the light, got the time and turned it right off again" (Record, p. 329).

At this time the master and lookout believed the tug had proceeded a distance of 16¼ miles

from Tree Point (Record, pp. 320, 344, 291). Mary Island light is 20 miles from Tree Point light. The master and lookout believed at the time the two point change was made that they were, therefore, about 3¾ miles from Mary Island light and probably would be able to see it if within range, and it was evident to their minds that they were off the course and out of range of the Mary Island light, hence the necessity of using every precaution to pick it up, and this was the reason that Johnson did not put down the two point change when it was made and it was in this sense that he had used the expression that tug was getting too close to the island. While from a quarter to a half mile is a safe clearance from the small island (Johnson, Record, p. 330, Brinker, 623, 633, Jacobsen, 591, 592, Dawe, 413, 414), yet, as Johnson stated, the weather was dirty and the wind was blowing thirty miles an hour or more, and it was quite natural for Johnson to use every precaution at that particular time, and it was no doubt good seamanship for him to keep the light on for as short a time as possible, as stated by him. At the rate the vessel was going, five knots an hour, the tug expected to pick up Mary Island light in a few minutes and Johnson intended to put down the two point change at that time (Record, p. 379), which was perfectly reasonable and proper under the circumstances.

It is claimed by respondent that Dawe con-

tradicted Bjerre in that Bjerre said Dawe was in the pilot house off Tree Point at 11:19 p. m. and that Dawe said he was not. The testimony of Bjerre is clear to the effect that Dawe did not come into the pilot house until 12:00 o'clock or afterwards (Record, p. 286-7) and that Dawe remained in the pilot house only for about three-quarters of an hour after midnight (*id.*), so it is very plain that Bjerre merely misspoke himself when he said that he asked the mate how far off Tree Point the tug was; or Bjerre might have asked the question when Dawe was outside of the pilot house. He probably asked Capt. Johnson, as it clearly appears there was a conversation between Johnson and Bjerre at the time Tree Point light was passed as to the distance the tug was off the light (Record, p. 341).

As to whether Capt. Johnson or Capt. Bjerre was in command: At the time the one-half point change in course was made at 1:00 o'clock Capt. Johnson gave the order to the helmsman, and the same thing occurred when the two point change was made shortly before 1:45 o'clock (Record, pp. 233-34-268); those were the only changes in course prior to the accident after leaving Tree Point at 1:19 o'clock that night. Bjerre passed the word for Dawe to go to the towing machine about quarter to one, but Johnson gave the order (Record, pp. 236-292-360).

When Bjerre, who had been master of the tug previously, came aboard the tug on this particular

trip, it was natural for Dawe not to know whether Bjerre or Johnson was in command and it was natural for Dawe, if Bjerre had chosen to give orders, to obey them, but Dawe says that Johnson as master of the ship was the man to whom he looked for orders, but what Dawe thought is entirely immaterial because the fact is that Johnson was master, had command of the tug and was in fact the navigating officer.

No jar caused by breaking of shackle: Croft and Foster, witnesses for respondent, are the only ones who testify there was a jar when the shackle broke; the other witnesses testify there was no jar (Record, pp. 249, 318, 361, 375, 377, 400, 381); that the breaking of the shackle was made known by the action of the towing machine (*id.*); that when the shackle broke, the tug naturally immediately gained an added momentum (*id.*), but that there was no jar (*id.*). Foster says:

"Q. What was the first thing that happened out of the ordinary?

A. The wheel was put hard a-port, and there was a jar and then this man came and called me.

Q. The wheel was put hard over?

A. Yes, sir.

Q. And there was a jar?

A. Yes, sir.

Q. And then you heard the man at the wheel come and call you?

A. Yes, sir.

Q. I understand you to say that the helmsman ported the helm. How could you tell the helm had been ported?

A. Well, if a man has been in the business as long as I have, you can tell by the way the ship is acting. I could tell the ship had been ported because she came down into the trough of the sea and the wind would slap her, and the sea and the wind caught her counter."

Which testimony shows that at the time the tug ported her helm and made the two point change, the barge ported her helm, as it was her duty to do (Record, pp. 471, 479, 480, 590, 608, 619, 620, 649, and the testimony of witnesses referred to *infra*). If the barge ported her helm as Foster says she did, then there was no strain on the shackle, even under respondent's theory of the case, because a two-point change would not make any appreciable strain on the shackle (Record, 331, 253, 254, 257). The evidence shows, and the court found, that the tug did not put her helm hard over so as to make a turn of 90 degrees until after the shackle had broken and until after the tug was maneuvering to assist the barge, so if, as Foster says, the helm of his barge was ported at the time the tug changed her course, it must have been done when the two point change was made, because no right angle turn of the tug was made until some time after the shackle was broken as above stated.

Respondent's claim of Impeachment of Bjerre:

There is no impeachment of Capt. Bjerre. He was asked the question: "What is your opinion of the care and skill and prudence of Johnson as a navigator at sea? A. My opinion of him is very high." There is no doubt but that Bjerre spoke the truth. The fact (if it were a fact) that Johnson, two months after this accident, became more or less intoxicated at Ketchikan (Record, pp. 364, 363, 285), while Foster, the libellant's witness was with him (Record, pp. 364-5), evidently did not shake Bjerre's confidence in Johnson's care, skill and prudence as a navigator at sea. One does not lose confidence in the care, skill or prudence of a physician because that physician has, at some time in his life, become intoxicated, and this applies to lawyers and persons engaged in any other business or profession.

The testimony is that in May, 1917, the time of the episode referred to, the tug, having the "Bangor" in tow, was at Ketchikan, having arrived there at ten o'clock a. m. (Record, p. 363); that it was the intention to leave Ketchikan about one o'clock of the same day; that Capt. Foster went up town and met Johnson and told him there was something wrong with the donkey boiler on the barge and he would not get out until the next day (Record, p. 363). So Johnson said: "There is no use of me going down then; I have done all my entering and clearing. There is no use of our going down if she don't go out before morning" (Record, p. 363). Capt. Foster was with John-

son all the time the latter was up town that day (Record, p. 364). Capt. Johnson came down to the tug in a taxicab, but whether Foster came with him or remained at the place Johnson had left, the record does not disclose.

On the trip during which this occurrence took place, Bjerre was with the tug and was naturally out of patience with Johnson because evidently the repairs to the barge's boiler had been made earlier than Foster had anticipated they would be. The episode referred to is an entirely immaterial matter. Johnson's testimony is to the effect that he was not intoxicated at Ketchikan in May, 1917, but that he had had some liquor. The uncontradicted testimony is that while Johnson takes a drink or two "once in a while," he never became intoxicated when in command of a ship (Record, pp. 302, 364). There is nothing contradictory as to this episode in the testimony of Johnson and Bjerre, and nothing to impeach Bjerre.

Johnson did not contradict himself as to going into Fort Simpson. He testified at the trial that he did not have any intention of putting into Port Simpson (Record, p. 313), and he testified prior to the trial, on being examined by the libellant (Record, p. 343), that he hauled up towards Port Simpson so that if the weather got worse he could go in and anchor. There is nothing inconsistent with those two statements, and even if there were, it is an immaterial matter.

In reference to the alleged ignorance of Johnson

as a navigator, it appears that on the witness stand he did not show himself apt in figuring out courses in degrees, etc., but he probably did as well in that respect as many experienced and competent navigators. It will be remembered that at least on tug boats, and probably on most other vessels, degrees are not used at all, but the vessel is steered by points, only points being shown upon the compass (Record, pp. 365, 411). Two degrees is counted as an eighth of a point (Record, p. 411), and that is sufficiently accurate for all practical purposes (Record, p. 411). Johnson's testimony on pages 347 and 348 of the Record, in reference to measurements, shows that he answered when he could with a reasonable degree of accuracy, and when he could not do so, he simply stated that he did not know the number of feet, etc., which was commendatory. The lower court saw Johnson upon the witness stand and heard him testify and the record is entirely barren of any intimation on the part of the lower court that Johnson was contumacious or unwilling to frankly state all of the facts within his knowledge. There were no inconsistencies in the testimony as given by Johnson in March, 1917, and his testimony given at the trial (Record, pp. 488, 489).

We have already discussed the testimony of the various witnesses as to the whereabouts of the tug's officers when the island was sighted and the shackle broke, from which it very plainly appears that Croft was mistaken in his statement that

Johnson was not in the pilot house and that Dawe was there. On many of the questions involved in the case there was a conflict of testimony, but in the light of such conflict, the court found the tug was guilty of no neglect, and it is confidently urged that the findings were all affirmative findings in favor of the appelle, notwithstanding the claim of the respondent that the court made no finding as to when the wheel of the tug was put hard over in respect to the time the shackle broke.

VII.

On the Question of Signals from Tug to Tow on Change of Course.

It has been the contention of respondent that the tug found herself close to the breakers immediately east of Mary Island and that it became necessary for her to put her helm hard over to port and that the tug should have signalled to the tow that the tug's helm was about to be put over.

The respondent's contention is based on several erroneous assumptions, namely: 1st, That the tug put her helm hard a-port and made the short turn before the shackle broke. But the lower court, on conflicting evidence, found to the contrary (Record, p. 724). 2nd, That the tug was near the breakers at the time the shackle broke. On this the court also found against respondent (Record, p. 724), on conflicting evidence. 3rd, That it was the duty of the tug to give the barge a signal that the tug was about to port her helm, or a signal for

the barge to put her helm in the opposite direction. On this also, by the same finding, the court found against respondent. 4th, That by porting her helm without first signalling to the barge, the tug subjected the towing device to an undue strain. On this, the court found such action on the part of the tug "not usual, customary or necessary," and that, according to some witnesses, such action was not proper and even dangerous (Record, pp. 725, 476); that any strain actually put upon the shackle should have been withstood and that the shackle broke because defective (Record, p. 727).

From a reading of the entire testimony on this question, it will be found that the court's findings are fully justified. Most of the witnesses who testified on this point had been given the weather conditions and were testifying in reference thereto. To attempt to quote the evidence on this or the many other questions of fact, would increase the burden of the court, rather than lighten it; the testimony in the case will be found to sustain the court's findings and his action in dismissing the libel.

For instance, Tug Captain F. L. Harriman testified: I never heard of a custom for tug, when she ported her helm so as to take a right angle course, giving the barge any signal to port her helm; never gave a tow any signal to port or starboard her helm at whatever angle the tug turns; general practice is for the tug to port her helm and go ahead (Record, p. 479); it is the duty of

the tow, from his bow, to watch the tow line to tell which way it is leading (Record, p. 471); I came across Dixon's Entrance last night, running eight knots per hour, with a tow, in a 30 mile fair wind, flood tide, without my towing machine on; didn't think it necessary (Record, p. 475). (That is, the towing machine was rigid.) And if I had had occasion to suddenly port my helm hard over, I would have done so and done nothing else (Record, p. 476); nor have put my towing machine in automatic, even in making a 90 degree turn last night (Record, p. 477).

McRae, a barge captain, testified: Duty of barge to follow tug's lights without signals, and reasons given. No signals given (Record, pp. 479, 480); customary to follow tug's lights without signals (Record, p. 479).

Capt. Jacobsen testified that he would not consider the Revillagigedo Channel narrow waters to call for any notice or signal to the captain of the barge to be particular about steering (Record, p. 590); he also said:

> "Q. Captain, assuming that when the tug found herself close to Mary Island and she put her helm hard a-port, so as to cause the tug to go at right angles to her former course, and at that time the shackle belonging to the barge, attached to the barge, broke, what would you consider was the cause of the breaking of the shackle?
>
> A. It could not have been strong enough.

Q. It was an improper shackle for the use for which it was used?

A. It was not strong enough.

Q. I will ask you whether or not it is usual or customary for tug boats plying between here and Southeastern Alaska waters, and through Revillagigedo Channel, to give signals when the tug is about to change her course?

A. No, sir, at least I don't."

Capt. E. W. Smith also testified, having been given the conditions existing the night of the accident, that in similar circumstances, many times, when he made land directly ahead, he had starboarded or ported to clear the obstruction, and that it is not customary to give any signal.

"Speaking of my own experience, occasionally we do. For instance, in this particular case, we will say that we are going along here and we pass very close to some floating obstruction, we will say, or possibly we will say it was a rock or something, but some obstruction. Now, we know very well if the barge continues on she has a very good chance of hitting it, posslbly we miss it if we go straight on, and the barge may be off our track a little and she might hit it. In that case we would blow her a whistle" (Record, p. 608). (See, also, Record, bottom of p. 619, and p. 620.)

This witness was in the employ of Griffith &

Sons (Record, p. 611), and it is the custom of *that* company to have towing cards on tugs and barge (Record, p. 614). Snoddy (Record, pp. 666-7).

Capt. Olsen (Record, pp. 643, 646) also testified if he had occasion to make a 90 degree turn of his tug, he would not give any signal to the barge—"not if the towing machine worked. That is supposed to take the strain off the tow line" (Record, p. 646). (The Commodore had a towing machine of best type (Record, pp. 240, 254), in automatic, at and before the time of the accident (Record, pp. 254, 375, 376, 379).

On the question of giving sinal, see:

Capt. Snoddy (Record, pp. 652, 653, 659, 663, 664, 665, 666).

Capt. Brinker (Record, pp. 625, 626).

Capt. Nielsen (Record, pp. 675, 682, 697).

Capt. H. R. Smith (Record, pp. 220, 226).

Capt Bjerre (Record, pp. 250, 251, 252, 254).

Capt. Johnson (Record, pp. 355, 356).

Capt. Dawe (Record, pp. 380, 381).

Foster, respondent's barge captain (Record, pp. 57 and 58) would not testify that the tug should have given any signal to the barge before the shackle broke. He said that it was for the master of the tug to use his best judgment as to whether or not he should give a signal and when it should be given and the circumstances under which it should be given; that it was for the captain to act according to his best judgment as things

appeared at the time. He also says (Record, p. 59) that he dropped the anchor from the barge ten or fifteen minutes after the shackle broke and that the barge had drifted, before he cast the anchor, 800 or 900 or 1,000 feet. He also says (Record, p. 28) that he cast the anchor before he reached the breakers of the small island. The record does not show how far from the small island the breakers extended, but they no doubt extended for a considerable distance; so, according to Foster, the shackle broke when the barge was 1,000 feet away from the island, plus the distance from the island the breakers extended in an easterly or southeasterly direction. From this it is evident that the barge, had the shackle not broken, would have followed the tug to safety, as Judge Jennings found, because, as elsewhere shown herein, the barge would have made a smaller circle than did the tug and would have kept much farther away from the island than the tug was at the time the helm was ported, even assuming that the tug was, as Foster says, close to the island at the time the shackle broke. This is perfectly obvious without any testimony at all on the question. However, the testimony is ample to show that the barge would not have gone so close to the island as did the tug, even if the tug, when close to the island, had ported her helm so as to make a turn of 90 degrees. (See the testimony of witnesses elsewhere referred to herein, with their diagrams, and also the testimony of witnesses

who did not draw diagrams on this point.)

Foster also says (Record, p. 59), that he did not drop his anchor until ten or fifteen minutes after the shackle broke. On the same page he also says that the barge was going at the rate of five or six miles an hour at the time the shackle broke, so in fifteen minutes the barge would have drifted about a mile and a half, assuming that it kept its momentum, which no doubt it would do, with the wind blowing thirty miles an hour and the tide flooding in the direction of the island, as Foster says, between a mile and a half and two miles per hour. All of which corroborates the testimony of Bjerre and Johnson to the effect that at the time the shackle broke the tug was between a quarter and a half mile from the island.

Foster also says (Record, p. 65) that the orders of the master of the barge are to follow the tug, and that he knows when to change his course by looking at the lights of the tug, or if he can not see the lights, then by following the tow line (*id.*). He also said: "There is an electric light right at the top of the mast (of the tug) and he is supposed to follow that, and follow the tow line." The barge did not follow the tug because the shackle broke.

From the above testimony it appears that under all circumstances, day or night, no signal is given to the tow to change her helm, because her duty is to follow the tug, and if the tug cannot be seen, or her lights cannot be seen, by reason

of thick weather, or otherwise, it is the duty of the barge to put a man on the forecastle head to watch the tow line so the course of the barge may be changed when the tug changes her course. (Record, p. 226, and testimony of witnesses last cited).

There is no exception to this custom except that Mr. Smith says in *his own* experience, when he passes *very close* to some obstruction or rock, and when, if the barge continued on her course there would be a very good chance of the barge hitting such obstruction, he would blow a whistle, but he said that the blowing of a whistle is wholly in the discretion of the master. Witness Smith in his testimony had reference to towing for Griffths & Sons, whose custom it is to have signal cards on the tug and tow, but this practice, as the evidence shows, is limited to that company.

While witness Jacobsen says that a signal might be given in narrow waters, yet he says the channel where the accident occurred was not "narrow waters." If the tug gave a port or starboard signal, the barge would not know what the signal meant except in those cases where there had been a prearranged signal code; and there is no such code except on the Griffiths' barges.

Capt. Johnson says (Record, p. 315) that he did not even know the "Bangor" had on board a Griffiths signal card, but that he intended, on arriving at Ketchikan, to arrange with Capt. Fos-

ter of the barge a signal code for the portion of the voyage in the open sea.

Capt. Bjerre merely said that *if* signals were given by the tug, those on the signal card on the tug would have been used. But he said it was never customary to give signals to the barge either to port or starboard the helm. The Commodore had on board a Griffiths' signal card for the reason that at the time the Commodore was towing for Griffiths, but the "Bangor" was not owned by the Griffiths, and neither Bjerre nor Johnson knew that the "Bangor" had aboard a Griffiths' signal card.

There is no evidence whatever to justify the contention of respondent that a signal should have been given by the tug at the time it changed its course, to give the barge a signal to starboard the helm. Capt. Snoddy did not so testify. Snoddy said that he would not give a signal to the tow to port her helm and that he would rather the barge would put her helm the opposite way than to take a chance on giving a signal that might be misunderstood (Record, p. 663).

Capt. Sprague, witness for respondent, testified that as captain of a tug he made one trip, towing a barge, through the waters of this channel, and that was in 1897, and he made one trip through the channel as master of the barge being towed in 1898. The only other times he went through the channel was as a passenger on steamships (Record, p. 561). While he says that if he put

the helm of his tug hard a-port, he would have given to the barge the *established* signal, yet it appears in this case that there was no established signal, and it was the duty of the barge to follow the tug.

Grant, witness for respondent, said he knew nothing about a towing device (Record, p. 540), and his testimony was based upon the assumption that the tug and tow had an arrangement in reference to the use of signals.

We submit that the lower court made correct findings to the effect that it was not customary, usual or necessary to give the barge any signal to port its helm.

VIII.

The Weakness of the Barge's Shackle.

Crystallization of Shackle: The District Court, on conflicting evidence, found that the shackle was crystallized and did not break by reason of any sudden or unusual strain (Record, pp. 727, 728).

Avis, expert witness for respondent, testified on *direct* examination that the tensile strength of the barge's shackle was *43.4 tons* (Record, pp. 111, 112); that the shackle was good, merchantable wrought iron (Record, p. 116); that it was not crystallized before fracture (near Mary Island) (Record, pp. 112, 113), and that its breaking load was 43.4 tons (Record, p. 113); shackle was not crystallized (Record, p. 121); that the tensile strength of the barge's anchor chain was *forty-seven* tons and that the tensile strength of

the tug's steel hawser was *fifty-four* tons (Record, pp. 114, 126). The tug's hawser was one and one-fourth inch steel wire hawser made of six strands of nineteen wires each (Record, p. 491), and that was the cable Avis said had a tensile strength of fifty-four tons. These three units constituted the towing device. Avis testified that the weakest unit in this towing device would break first (Record, p. 136). Respondent has claimed that the shackle, having a breaking strength of 43.4 tons, was the weakest link in the towing device. The day after Mr. Avis had testified as above stated, as to the tensile strength of the units in the towing device, he was recalled by the respondent and was cross-examined by petitioner. In his cross-examination, the following testimony was given by him:

> "Q. I want to ask you a question on your examination yesterday, not on this point. You said the tensile strength of the shackle was 43.48 tons?
>
> A. 43.4.
>
> Q. Is that the tensile strength of both sides of the shackle, or of just one side of the shackle?
>
> A. That was the tensile strength of a speciment cut out of one piece of the shackle. shackle.
>
> Q. I thought the shackle had a tensile strength of 43 tons. You mean to say that the small piece that you took and subjected

to the machine test for tensile strength was 43 tons—that it took 43 tons to break this little piece which I hold in my hand, which is petitioner's Exhibit D-5 and D-6? It wouldn't take 43.4 tons to break that, would it?

A. Oh, no.

Q. What do you mean when you say the tensile strength of the shackle is 43.4?

A. On the basis of the tensile strength per pound per square inch.

Q. Yes, but what does that apply to, that 43.4 tons? Does it apply to one side of the shackle, or both sides of the shackle, or what?

A. That applies to an area of 1.66.

Q. In other words, it would take a load of 43.4 tons to break the side of the shackle which is respondent's exhibit D-7—or, I will change that—it would taks a load of 43.4 tons to break respondent's Exhibit D-7, from which you took the small portion that you applied the load to?

A. That is right.

Q. Then it would take twice 43.4 to break both sides of the shackle if the load were applied to both sides, wouldn't it?

A. Yes, sir.

Q. So that the shackle, then, should have withstood a load before breaking of 86.8 tons?

A. If applied on double that area of 1.66.

Q. Wasn't the load applied to both sides of the shackle equally when the shackle broke by reason of the hawser pulling it apart?

A. I presume it was.

Q. Then the tensile strength of that shackle was twice as much as you have heretofore stated?

A. If the load was applied uniformly.

Q. And you don't know where the load was applied, do you? You have no means of telling where that load was applied? You can answer that without hesitating—you don't know, do you?

A. The load was applied—

Q. You don't know, do you? Do you or do you not?

A. The load was applied on the pin—

Q. Do you or do you not know where that load was applied?

A. It was applied on the pin and the loop end of the shackle.

Q. Which would make it right in the center of the loop end of the shackle, wouldn't it, necessarily?

A. I presume so.

Q. Therefore the load then was applied equally to both sides of the shackle, wasn't it?

A. I presume it was .

Q. And it would take a load of 86.8 tons

to break it under those conditions, wouldn't it?

A. Under those conditions, yes, sir.

Q. Then if the cable had a tensile strength of 54 tons, the cable would have broken before the shackle broke, wouldn't it?

A. Under those conditions, yes.

Q. The anchor chain would have broken before the cable would have broken, wouldn't it, because you have stated that the tensile strength of the anchor chain was 47 tons?

A. Yes, sir.

Q. And the anchor chain would have broken, wouldn't it?

A. Yes, sir.

Q. And according to your testimony, if the load was applied from the center of the loop both the wire cable and the anchor chain would have broken before the shackle would have broken, isn't that right?

A. Under those conditions, yes, sir.

Q. And you don't know, as you say, where the load was applied, but presume it was applied from the center of the loop of the shackle, is that right?

A. I presume it was.

Q. Why didn't you say that yesterday, Mr. Avis?

A. Just that condition did not occur to me."

A mere glance at the shackle pin, in evidence,

shows, as Avis stated, that the strain was applied to the center of the pin and hence equally to both sides of the shackle.

If the shackle had been the strongest link in the towing device, *as Avis* on cross-examination *said it was* and should be *it would not have been broken first.* The fact that it broke, and the anchor chain or hawser did not, proves conclusively that the shackle was crystallized from vibration or other causes, or was weakened and defective from other causes, *before* the accident, as testified to by Tinkham and Lingerfelt, and explained by the evidence of other witnesses (Record, pp. 265, 266, 269, 270, 271, 327).

The shackle *should* have been the strongest link because it *should* have had a breaking strength of 86.4 tons, while the anchor chain, even if perfect, would break with a load of 47 tons and the hawser would break with a load of 54 tons (Avis testimony, *supra.*)

Under this state of facts, proven by the respondent himself, we contend that the breaking of the shackle, for which the respondent is responsible, was the proximate cause of the loss and exonerates the petitioner.

A tug cannot be held liable for damage to a tow-boat where the loss was due to defective appliances of the tow, which were not open and obvious to the tug's master.

The Edmund Levy, 128 Fed. 683 (C. C. A.)

Pederson vs. John D. Spreckels & Bros. Co., 87 Fed. 938, at p. 914 (C. C. A.).

The proximate cause is the immediate causing cause. The defective shackle of respondent's barge "Bangor" broke, and instantly thereby caused the injury. A sound shackle would not have thus broken, and the barge would then have followed the tug to safety. Thus the defect in respondent's shackle was the efficient cause that produced the injury.

The Wilhelm, 47 Fed. 89, (D. C.), was affirmed in 52 Fed. 602, (C. C. A.), though reversed in 59 Fed. 169, (C. C. A.), on other grounds, where Taft, Circuit Judge, on p. 174, said the line parted before the maneuver was completed and the fault was in getting too close to shore in a violent storm.

Respondent ignores the defect in the shackle and argues that alleged acts of negligence on the part of petitioner were the united proximate cause of the loss. But, under the language used by Gray, Circuit Judge, in "*The Startle*," 115 Fed. 555, at 560, petitioner in the case at bar most clearly can and does contend that the alleged acts of negligence of petitioner were not the proximate cause of the injury, though the petitioner might, for argument's sake, admit they were acts of negligence; yet the real causal, proximate cause was the weakness of the shackle. There was not, could not, be any causal relation between the alleged acts of negligence of petitioner and the

actual breaking of the defective shackle, for those alleged acts of negligence might have co-existed and still the injury would not have occurred had respondent's shackle been sound. "It is impossible to predicate the loss of the 'Bangor's' cargo," or her injury, "as a necessary and immediate consequence of" any alleged fault on the part of petitioner, and this is the exact language of Gray, Circuit Judge, *supra, mutatis mutandis;* and he adds:

> "There are always many antecedents to a given catastrophe, but for the existence of which, the result inquired about would not have occurred; it is, however, only the *direct and immediate* cause under the control of human agency, which can be judicially considered."

In *The Express*, 52 Fed. 890 (C. C. A.), (collision), the respondent steamer *Express* was *held* properly exonerated, because, as said by the court, p. 892, even

> "if she was culpable in any other respects, her fault was innocuous, because not a proximate cause."

Similarly, in

The Partia, 64 Fed. 811 (C. C. A.), collision, two tugs conjointly towing barges, were exonerated, notwithstanding the hazardous situation was brought about by the failure of the tugs to perform their obligations, and their fault though gross and inexcusable, was not proximate cause

of the collision as the respondent steamship could have avoided it by obeying the rule. And in

The Pannpeck, 86 Fed. 924, (C. C. A), collision, a tug, with a tow, was exonerated for being too near shore and thus being the occasion of the collision by a ferry boat backing into the tow, and the tug was *held* not liable for the injury, which was not the proximate result of such negligence, but of the intervening and direct negligent cause by one or both of the other vessels.

In the case of "*The Enterprise*," 228 Fed. 131, at page 134, the question of proximate cause is discussed and following definition approved:

> "That only is a proximate cause of an event, judicially considered, which in a natural sequence, *unbroken by any new and intervening cause*, produces that event, and without which that event would not have occurred. It must be an efficient act or causation separated from its effect by no other act of causation."

Where a tow (as in the case at bar) furnishes a master and crew, the tug can not be held liable for damage resulting from defective appliances of the tow.

The Lyndhurst, 147 Fed. 110 (C. A. C.).
The Edwin Terry, 162 Fed. 309 (C. C. A.).
The Lady Wimett, 92 Fed. 399 (D. C.).
Reilly vs. Cornell Steamboat Co., 214 Fed. 60, at p. 62 (C. C. A.).

And as the immediate, proximate cause in the

case at bar was the defect in the weak shackle,—a defect wholly unknown to petitioner—it follows that respondent's loss was caused by his own act, and not that of petitioner.

It is needless to cite authorities on the principle, "*causa proxima, non remota, spectatur,*" and, when once the efficient, direct and immediate cause is ascertained, the judicial inquiry of causation ceases. It is quite noticeable that respondent wholly ignores this vital principle, for he entirely overleaps his weak shackle as an element of causation, and jumps to the porting of the wheel and other alleged acts of negligence as the cause; but that violates both logic and the legal principle above stated, and involves the inquiry in confusion. The weak shackle is the fulcrum and the crux of this entire case.

On the question of crystallization, Mr. Avis not only disagreed with Tinkham and with Lingerfelt, but with the authors of several standard works on the subject (Record, pp. 506, 507, 508, 509 and 513), and the actual instances of crystallization by vibration, cited by various witnesses (Record, pp. 265-266, 269, 270, 271), seem to have had no effect upon his views. His attempt, intentional or otherwise, to have the court believe the shackle, under the conditions in which the strain was applied to it at the time of the accident, had a tensile strength of 43.4 tons, when, in fact, it had a tensile strength of 86.8 tons, *which he was afterwards forced to admit*, does not recommend the

views which he expresses as an expert witness.

As to lapse of time between the porting of the tug's helm and the porting of the barge's helm:

The District Court found:

> "It is manifest that the strain is not increased at the very moment of porting the helm of the tug except perhaps by the increased slack, if any. The sudden strain comes at the moment when the distance traveled by the tug on its new course is sufficient to take up the slack of the line. When that moment does arrive necessarily the strain is increased, and that increase will, in the absence of a towing machine, be sudden, provided the barge has not likewise ported its helm. How much time would elapse between the act of porting the tug's helm and the instant of sudden increased strain caused by the slack being taken up would, of course, depend on the speed of the barge and the tug. In the case at bar, there is no evidence that this period of time was too short for efficient action by the man at the helm of the barge" (Record, p. 726).

It has been claimed by respondent that the District Court misconceived the law of physics applied to the conditions present. This claim is shown to be erroneous upon a reading of the testimony of the various witnesses on the effect of a towing machine in taking up the strain.

Notwithstanding Avis' testimony for respond-

ent (Record, pp. 139 and 140), if the tug had made a right angle turn, as claimed by respondent, the towing machine would not have immediately taken up the slack in the tow line caused thereby, but it would have taken up the slack gradually. After the slack was taken in by the towing machine, there would be a strain upon the towing device, but that strain would not be sudden nor unusual; it would be gradual and not excessive, because when the slack had been taken up the towing machine would commence again to pay out the tow line and as it paid out the strain would gradually increase. Avis testified that in figuring the impact of 114 tons which he claims was applied if the tug made a ninety degree turn, he considered that one end of the towing device was rigidly attached to the tug and the other end to the barge, and he did not take into consideration the compensating effect of the towing device. He forgot to give consideration to the most important element. The very purpose of a towing machine is to prevent a sudden impact and this Mr. Avis did not consider at all (Record, pp. 139, 140; 127-128). Mr. Avis did not give any evidence whatever as to the amount of strain which a two point turn would impose upon the towing device. Petitioner's contention is that only a two point turn was made and the evidence of the witnesses shows that with or without a towing machine the strain caused by a two point turn would be negligible

(Record, pp. 253, 254, 389, also testimony on 90 degree turn mentioned below).

Mr. Foster (witness for respondent (Record, p. 27), testified as above set out, that the wheel of the barge was put hard a-port and that afterwards there was a jar. So, from the respondent's own testimony it appears that the barge, as it was its duty to do, did follow the tug by observing her lights, so that the condition assumed by Mr. Avis never existed; that is, if the tug did make a ninety degree turn the barge was making the turn at the same time and the conditions assumed by Mr. Avis never existed. That is shown by respondent's own witness, Foster, and he is the only man who testified on the subject. Of course, it was impossible for anybody upon the tug to know how long it was after the tug had ported her helm that the barge ported hers. The only persons who had any knowledge of that fact were those upon the barge, because it was they who saw the range lights of the tug changing their position and it was they who ported the helm of the barge, and they alone know how long a time elapsed between the porting of the helm of the tug and the porting of the helm of the barge. The testimony of the respondent, however, is silent on this subject. Clearly petitioner should not be required to show something that can not possibly be within its knowledge but which is exclusively within the knowledge of the respondent. As in this brief elsewhere shown, we contend

the burden was on the respondent to show the facts in connection with this matter and to show that no action upon the part of the barge could have avoided the alleged sudden and excessive strain caused by the tug's helm being suddenly put hard over, and it was for the respondent to show that there was not a sufficient period of time elapsing between the porting of the tug's helm and the porting of the barge's helm for efficient action on the part of the barge's helmsman, whatever that action should have been. It is entirely immaterial whether or not the barge saw the small island, if the tug made the ninety degree turn, as alleged, because it was the barge's duty to follow the tug and to port her helm when she saw the range lights change position. If the barge failed to act with that degree of promptness which would have saved any disaster, then the barge must suffer the consequences for its own delay and neglect.

The argument of respondent on this point is based on the erroneous assumption that the tug made a ninety degree turn. If the tug did make a ninety degree turn, as claimed by respondent, when close to the island, or if it made merely a two pointt urn when half a mile from the island, as claimed by petitioner, the duty of the barge would be the same in either case, and if its duty had been performed, the barge would not have been damaged, because, as respondent's witness Sprague says, and as the petitioner's witnesses

testify, the barge would either have followed in the wake of the tug or would have made a smaller circle than the tug would have made in making a ninety degree turn. Whether the barge ported her helm or not, it would have followed in the path of the tug, or inside the circle made by the tug (Johnson, Record, p. 331, and Exhibit 25; H. R. Smith, Record, p. 221, and Exhibit 21; Bjerre, p. 255, and Exhibit 22; Dawe, p. 383, and Exhibit 27).

Tug did not negligently put her wheel hard over to port:

The findings of the District Court, we contend, dispose of this point in favor of petitioner. Furthermore,e the tug did not find herself in dangerous proximity to the small island nor did she find it necessary to put her helm hard over suddenly at an angle of ninety degrees, nor was the tug going at full speed ahead when she made the two point turn, but only at half speed, namely, five knots per hour, and the burden was not on petitioner to show that the sudden turn, even if made by the tug, was not negligence. Respondent contends that the tug made a ninety degree turn when she was going full speed ahead. Johnson testified directly to the contrary, and so did Bjerre (Record, above; [Dawe, pp. 379, 381]); also Engineer Smith (Record, pp. 368-9). Johnson's testimony as to the ninety degree turn, beyond question, had reference to the time when the tug found herself close to the island, when she was

making endeavors, after the barge had broken away, to rescue her, and Capt. Bjerre's testimony is clearly to the same effect. The uncontradicted testimony in the case is that after Johnson put the towing machine in automatic about 11:30 o'clock that night, it continued in automatic until after the shackle broke. There is nothing in the testimony of Capt. Olsen, E. W. Smith, Capt. Snoddy, Capt. Nielsen, H. R. Smith, Capt. Cann, Capt. Jacobsen, Capt. Harriman, Capt. Bjerre or Capt. Johnson lending color to any of the contentions of respondent, as a reading of their testimony and the testimony of Capt. Dawe will show. Their testimony is to the effect that the towing machine takes up any undue strain, whether caused by ninety degree turns of the tug, heavy seas, or otherwise, and that with a towing machine there is no undue or sudden strain upon the towing device, even though the barge does not port its helm (Capt. Bjerre, Record, pp. 257, 238; Capt. E. W. Smith, p. 631; Capt. Dawe. p. 389; Capt. Johnson, p. 331; Capt. Brinker, p. 625; Capt. H. R. Smith, p. 224; Capt. Cann, pp. 570, 571; Engineer Smith, pp. 369, 370). Especially would this be so when the tug was going at only half speed (Record, p. 224).

The testimony of Grant, witness for respondent, as to "awful strain," had reference to a ninety degree turn without a towing device, and he says that if there was a towing machine on board the tug, it would and did take up all the slack; when

the tug put her helm hard a-port, the line would be always keeping the same strain.

The testimony in the case is that the towing machine was in operation and was perfectly performing all the work for which it was designed (Record, p. 254, and elsewhere referred to herein). The evidence also shows that the towing machine was the newest and the very best and most expensive that could be obtained in the market (Record, p. 240).

The testimony of Sprague, witness for respondent, is not illuminating on this subject, because he knew nothing about towing machines. After admitting in substance that he knows nothing about the effect of a towing machine, he proceeds to say that if the steam is on the gear the strain will be a constant and uniform one, which is not contradictory to the testimony of of the other witnesses on this point. Sprague salso says that if a towing machine is in working order at the time a ninety degree change is made, there would be no perceptible additional strain on the towing device (Record, pp. 557, 558).

Avis' testimony, to the effect that it would have taken a shackle 2.63 times as large as the shackle in evidence to sustain a load of 114.48 tons (Record, pp. 117-119) throws no light on the question, because, as shown, he failed to take into consideration the effect of the towing machine and considered the towing device rigid. As against the testimony of the numerous tug captains and the

barge captain, McRae, it would seem that Avis' expert opinion is not entitled to any consideration. Avis (Record, p. 134) testified that there was no evidence from the condition of the shackle of a compensating tendency sufficient to reduce the load of 114 tons below the breaking load of the shackle. Of course, the condition of the shackle would not show anything on this question.

Other ninety degree turns: The evidence is (Bjerre, Record, pp. 279, 309, 310), that ninety degree, and more, turns are made by all tugs over the waters covered by the voyage in question. In the absence of testimony that these turns are made at full speed, the presumption is they are so made. However that may be, if a ninety degree turn was made by the "*Commodore*," it was made at only half speed, because the vessel had been slowed down at one o'clock as shown by the log book and the uncontradicted testimony.

The effect of the towing machine, working automatically, when a strain is applied to the hawser:

We shall not take the space to quote the testimony of the various witnesses on this point. Suffice it to say that their testimony shows the breaking of the shackle was not caused by any sudden or undue stress upon it, because such sudden or violent stress could not occur with the towing machine in operation upon the "*Commodore*." At the time the turn was made (whether a ninety degree turn or merely a two point turn), there were 180 fathoms of the tow line off the

drum, leaving 20 fathoms (120 feet) on the drum (Record, pp. 253, 401). If there was any additional strain placed upon the towing device by the turn of the tug, that strain would gradually be taken up by the towing device. And whether the remaining 120 feet of hawser on the drum would all be paid out by reason of that strain would depend entirely on the amount of strain. As the hawser paid out off the drum, the resistance of the towing machine would gradually increase, and as Johnson says, probably the entire 120 feet would not pay off because the steam would go into the towing machine cylinder and increase the resistance of the towing machine. If the strain was sufficient to cause the paying out of the entire 120 feet on the drum, then, of course, the entire towing device would become rigid as soon as the entire 120 feet were off the drum; but that was not the case here. It is very seldom that the entire hawser pays off the towing machine, and Dawe (Record, pp. 399, 400, 401, 409) testifies that he was standing by the towing machine at and before the shackle carried away, and that immediately before the break, only about one and a half feet had paid off, leaving still on the drum 118½ feet, which shows conclusively that at the time the shackle broke, there was practically no greater strain on the towing device than was necessary to carry the barge along on a straight course. This disposes of the theory of respondent that there was an excessive strain or any sudden

strain or any jerk upon the towing device by reason of any turn the tug made.

It also shows that the shackle broke a few minutes after the two point change in course was made, and when there was no unusual strain on the towing device.

The cases relied upon by respondent upon this point are not applicable to the case at bar. The case of "*The Coastwise*," 230 Fed. 505, 233 Fed. 1, does not apply, because in the case at bar there was no deviation from the proper course and no sudden strain was placed on the tow by reason of any deviation from a proper course.

The case of *Wilson vs. Sibley*, 36 Fed. 379, has no application because the unseaworthiness of the barge "*Bangor*" has been definitely proved, and because in the case at bar no sudden or excessive strain was placed upon the towing device.

The other cases relied on by respondent are equally inapplicable. None of them were cases where towing machines were in use.

IX.

THERE WAS NO NEGLIGENCE OR WANT OF REASONABLE CARE, CAUTION OR MARITIME SKILL ON THE PART OF THOSE IN CHARGE OF THE TUG.

In the Circuit Court of Appeals the appellant there, who is respondent here, made a part of his brief three tables, which he designated "Table One," "Table Two," and "Table Three." Anticipating that the same tables will be made a part of his brief in this court, we copy them, as follows:

TABLE ONE.

First Course: From Tree Point; 11:19 p. m. to 1:00 a. m.

Actual compass course steered: (Rec. p. 294.)	NW½W	309° 23′	
Add deviation (easterly):		2°	
Magnetic course actually steered:		311° 23′	N48° 37′W
(Rec. p. 295.) Rec. p. 495.)			N48½W
Bjerre calculated his compass course of NW½W would make his actual course (magnetic):	NW⅜W	310° 47′	N49¼W
(Rec. pp. 273, 297, 495.) Divergence			36′ easterly

Second Course: Thence, 1:00 to 1:45 a. m.

Actual compass course steered: (Rec. p. 233.)	NW	315°	
Add deviation (easterly):		2°	
Magnetic course actually steered: (Rec. p. 495.)		317°	N43W
Bjerre calculated his compass course of NW would make his actual course (magnetic): (Rec. pp. 303, 495).	NW⅛W	313° 36′	N46½W
Divergence:			3° 24′ easterly

Bjerre, in making allowance for the deviation:
On the 1st course DEDUCTED ⅛ of a point from his compass course: NW½W minus ⅛=NW⅜W.
On the 2nd course, he ADDED ⅛ of a point to his compass course; NW plus ⅛ = NW⅛W.

Note—The deviation of 2° has been added to the compass course in the above illustrations because in going around the compass to the right a deviation easterly is added; in going around the compass to the left the deviation is deducted (Bjerre, Rec. p. 295; Rec. p. 467); the result, of course, is the same:

		To Left	To Right
Compass course, NW:		N 45° W	315°
Deviation of 2°:	Deduct	2	
	Add		2
Magnetic course actually steered:		N 43° W	317°

TABLE TWO.

From Tree Point, the courses, speed, time and distances run, as testified to by Bjerre and Johnson, were as follows:

Time.	Tug's Courses:	
11:19 pm	Tree Point NW½W ship's compass (NW⅝W magnetic)	Bjerre, Rec. 233, 303
	Log book entry	Johnson, Rec. 328
	Entry made at 11:19	Johnson, Rec. 328
	Between 11:19 pm and 1:00 am	
	Speed:	
	Between 7 and 8 knots,	Johnson, Rec. 312, 313
	Between 7½ and 8 knots,	Bjerre, Rec. 233
	About 7½ knots	Bjerre, Rec. 259
	Distance run:	
	12½ miles,	Johnson, Rec. 320
	12 miles,	Bjerre, Rec. 291
1:00 am	Changed, slowed down, NW ship's compass (NW⅛W magnetic)	Bjerre, Rec. 303
	Log book entry,	Johnson, Rec. 328
	Entry made at 1:00 am	Johnson, Rec, 329
	Between 1:00 and 1:45 am	
	Speed: 5 knots,	Bjerre, Rec. 235
	Saw by dial on telegraph in pilot house, tug going at half speed,	Bjerre, Rec. 235
	5 knots,	Johnson, Rec. 320
	Distance run: 3¾ miles,	Johnson, Rec. 320
	A few minutes before a quarter to two saw a small island ahead,	Johnson, Rec. 312
	Just fair ahead, about right ahead,	Bjerre, Rec. 234
	We ported our helm two points to clear the island,	Johnson, Rec. 312
	Distance run from Tree Point (11:19 pm) to two-point change of course at 1:00 am, 17, 16 or 17 miles,	Bjerre, Rec. 263
	17½ miles,	Johnson, Rec. 345
	12½ miles at 7½ knots and 3¾ miles at 5 knots wouldn't take them 17½ miles; there may have been some error in calculation of speed, enough to make up difference,	Johnson, Rec. 346
	About 18 miles from Tree Point to the little island,	Johnson, Rec. 345
	Went within ½ mile of island, 17½ miles,	Johnson, Rec. 345
	Didn't know how many minutes after two point turn before machine began running away (when shackle broke) (towing machine),	Johnson, Rec. 348
1:45 am	Barge broke away. Log book entry,	Johnson, Rec. 329
	This entry made "sometime in the morning when we anchored or was running around. I don't know which,"	Johnson, Rec. 329

TABLE THREE.

Take as termini: a point ¾ of a mile off Tree Point and a point ½ mile southeasterly of the little island:

Time actually consumed in run between termini: 11:19 pm to 1:45 am, 2 hours 26 minutes.

Distance between termini:

17 miles on straight line;

17½ miles on two courses, first of which was NW⅜W mag.

Rate of speed per hour tug travelled:

On straight line, 7.124 knots

On the two courses in log book if first course, 11:19 pm to 1:00 am was 7½ knots per hour, then on second course, 1:00 to 1:45 am speed was per hour, 6.62 knots

if first course was 8 knots per hour then on second course speed would be 5.98 knots

Take as termini: a point of ¾ miles off Tree Point and the southeast point of the little island:

Time actually consumed in run, as above, 2 hours 26 minutes.

Distance between termini:

18 miles in straight line.

18.1 miles on two courses, first of which was NW⅜W mag.

Rate of speed travelled:

On straight line, 7.397 knots

On two courses in log book,

if on first course, 11:19 pm to 1:00 am speed was 7½ knots,

then on second course, 1:00 to 1:45 am speed was 7.3 knots

if on first course speed was 8 knots, then on second course speed would be 6.65 knots

Table One: This table does not show any error on the part of Bjerre or Johnson in calculating either the first or second compass course, so far as steering the vessel was concerned. The testimony of both Bjerre and Johnson as to the courses affirms their acts the night of the accident. The compass had a deviation of two degrees to the east (Record, pp. 233, 294, 296, 387). Two degrees, for all practical purposes, is equal to one-eighth of a point, and vessels generally work to a quarter of a point (Record, p. 411). Degrees are not used on the compass (*Id.*). Both the first and second courses, steered from Tree Point to the place where the two point turn to the north was made, were *compass courses*. Bjerre said:

> A. * * * The course we steered by there was, *by our compass*, NW½W, and I believe that was the usual course for the "Commodore" to take over that run; however, that was the proper chart course for that distance and we run on that course.
>
> Q. Just a minute—what was the deviation of your compass?
>
> A. The deviation was two degrees to the east.
>
> Q. And that would make the chart direction on that course what?
>
> A. It would make the actual course northwest ⅜ west—just about.
>
> * * * * * *

A. Yes, we set our course northwest ½ west. * * *

A. * * * Well, we changed the course then, and I heard Captain Johnson direct the helmsman to change one-half a point to the north, which would make the course then NW.

* * * * * *

Q. When the change of course was made one-half point to the north so that the tug took a course NW, you said the tug slowed down?

A. Yes, the tug slowed down."

(Record, pp. 233, 234).

"A. * * * At the time we saw the island we were steering NW and had the island right ahead. We were coming down here from here, and we ported two points, enough to clear here."

(Record, p. 237).

"Q. What was the deviation of the compass?

A. Two degrees east.

Q. Then, steering by the compass a course NW½W would be what course on the chart?

A. Magnetic, NW⅜W.

Q. And allowing for the deviation of the compass you would be steering what way by the compass on the last course you took after one o'clock?

A. The northwest course, you mean?

Q. Yes.

A. We would be steering about NW1/8W.

Q. Would it be one-eighth?

A. No, not 1/8—between 7/8 and 3/4. Now, wait a minute—we would be steering NW1/8—between an eighth and a quarter west.

Q. From one o'clock, after you made the one-half point change, what would be the magnetic course?

* * * * * *

A. It would be NW about 1/8W—*we were steering NW by our compass.*

Q. What course were you steering *by your compass* on the last course after one o'clock?

A. After the one-half point change?

Q. Yes.

A. We were steering NW *by our compass.*"

(Record, p. 273).

"Q. What did you say was your *compass course* from Tree Point?

A. Northwest 1/2 west, what we steered.

Q. Northwest 1/2 west *compass course?*

A. That is what we steered *by our compass.*

Q. That is what you steered by your compass?

A. Yes.

Q. And your compass had a two degree deviation to the east?

A. Yes, sir."

(Record, p. 294).

"Q. Yetserday, you testified that your courses were compass courses, and the NW½W was your compass course?

A. Yes, that is what we were steering.

Q. That is your compass course in that log for that voyage?

A. Yes, that is what we were steering.

Q. That is correct, according to the compass card in your pilot-house?

A. Yes, sir.

Q. And your compass had a deviation of two degrees to the east?

A. Yes, sir.

* * * * * *

Q. Never mind the chart. Here is your log book; you say from Tree Point you steered NW½W?

A. Yes, sir.

Q. By your compass?

A. Yes, sir.

Q. And your compass has a deviation of two degrees to the east?

A. Yes, sir."

(Record, p. 296).

"Q. Now, looking at the log book under date of March 25th, the page marked, 'Libellant's Exhibit 2,' note the course 11:19 Tree Point, NW½W.

A. Yes.

Q. What was the actual direction the ship was going at that time?

A. It was going NW3/8W.

Q. Now, look at the next course, 'one o'clock, changed, slowed down, NW'—what was the actual course of the vessel, magnetic, at that time?

A. NW about 1/8W."

(Record, p. 303).

"Q. What is NW3/8W reduced to degrees? Reduce NW3/8W to degrees.

* * * * * *

A. Let me get the course you want first.

Q. NW3/8W magnetic?

A. It would make it 49:13:07.

Q. A NW3/8W course is north 49 degrees, 13 minutes, seven seconds west; is that right?

A. Yes."

(Record, pp. 296 and 97).

Capt. Johnson testified:

"Q. Now, Capt. Johnson, you say that NW1/2W *on your compass*, allowing for the deviation, is the same as NW3/8W magnetic, is that right?

A. Yes."

(Record, p. 339).

"Q. Then you laid out this course of NW1/2W from Tree Point north, is that right?

A. Yes."

(Record, p. 341).

Capt. Dawe testified:

"Q. You stated you came into the pilot-house at what time that night?

A. Twelve o'clock.

Q. Did you notice the course the ship was steering at that time?

A. Capt. Johnson told me the course.

Q. Did you look at the compass yourself to see?

A. No, I didn't.

Q. What course did he tell you the vessel was steering?

A. Northwest one-half west.

Q. Is that compass course or magnetic course?

A. *Compass course.*"

(Record, pp. 386, 387).

"Q. Now, in running a compass course from Tree Point northwest one-half west, taking into consideration a deviation of two degrees to the east, what would be the magnetic course?

A. Northwest 3/8 west."

(Record, p. 389).

Dawe further stated that he had run this magnetic course of northwest 3/8 west clear through from Tree Point to Mary Island light not less than thirty times, and that in making that course he had gone on a compass course of northwest 1/2 west (Record, p. 390).

Capt. Bjerre's testimony shows that he was

apt at determining the degrees of any particular compass course (Record, p. 294, *et seq.*, pp. 308-9). It will be noticed from his cross-examination that respondent insisted that Capt. Bjerre was mistaken with reference to deducting or adding the two degrees deviation when the vessel was pursuing a course west of north, the respondent insisting that the two degree deviation should be added and Bjerre as stoutly maintaining that it should be deducted. His cross-examination was left without determining who was right or wrong, but later on, when Capt. Bjerre took the stand again with standard books, for the purpose of demonstrating that he was right in his testimony as to deducting the deviation, counsel for respondent, without giving Capt. Bjerre the opportunity of saying anything further, addressed the court, as follows:

> "I desire to make a statement to the court at this time. Proctor for libellant has been in error so far as the two point deviation is concerned. My error was an honest one, and I was endeavoring to examine the witnesses along the theory that I had conceived to be the true theory. I will admit that Capt. Bjerre's statement as to the compass courses with the deviation, deducting instead of adding the two degrees, is correct" (Record, p. 467).

We think it clearly appears that Capt. Bjerre is a thoroughly competent navigator.

Bjerre testified that the magnetic course, where the compass course was northwest ½ west with a deviation of two degrees to the east, would be 310 degrees, 47 minutes, whereas Dibrell, for respondent, testified that it would be 311 degrees, 23 minutes, a divergence of 36 minutes easterly. Capt. Bjerre hastily on the witness stand figured out the degrees, minutes and seconds of this course, and it is not strange that he did not figure with absolute correctness.

> "One *degree* would hardly make any difference on a trip of that kind in Alaska. It is hardly noticeable on account of the current, wind and steering" (Capt. Cann, Record, p. 377). Two degrees would make no appreciable difference between Tree Point and Mary Island (Foster, Record, p. 47).

As above stated, Capt. Bjerre insisted on cross-examination (Record, p. 294, *et seq.*, pp. 308-9) that the deviation was to be deducted, but when he was asked what the magnetic course would be if the compass course was northwest, taking into consideration the deviation of two degrees to the east, he stated that it would be northwest ⅛ west, whereas he should have stated northwest ⅛ north. His statement was a mere lapse in speaking, not caused by lack of knowledge, because his entire testimony clearly shows that he knew exactly what the magnetic course was on a compass course of northwest with a deviation of two degrees to the east and had convinced proctor for respondent

that the two degree deviation should be deducted instead of added, as was insisted upon by respondent.

The testimony as above quoted proves that the tug on all the courses between Tree Point and the time the shackle broke was steered *by the compass.* The compass courses were undoubtedly the correct courses to travel from Tree Point past Mary Island. That is shown by the testimony of all the witnesses (experienced master mariners) examined on ths point, of whom there were many, including most, if not all the following: Bjerre, Johnson, Dawe, Nielsen, Olsen, Jacobsen, Harriman, Brinker, Cann, Smith and Snoddy.

The fact that Bjerre made an error in saying that the compass course northwest was a two degree deviation to the west, equalled a magnetic course of northwest ⅛ west, did not, of course, change the course of the vessel in making the trip nine months before the testimony was given. Nor could the fact that Bjerre made a slight error in calculating degrees, minutes and seconds on the witness stand during the hurry of a trial change the course the vessel had taken many months before. Neither Capt. Bjerre nor Capt. Johnson made any error on the night of the accident in calculating either of the courses, and they testified that a compass course of northwest ½ west, with a deviation of two degrees to the east was the same as a magnetic course of northwest ⅜ west, because of the fact that two degrees in navigating

a vessel are counted as one-eighth of a point. Two degrees are between one-eighth and a quarter of a point, but in actual practice two degrees are counted as one-eighth of a point, as the testimony shows, and that is all the witnesses meant in testifying as stated. They did not make an error on the night of the accident merely because nine months after on the witness stand, they stated that compass course northwest, with a deviation of two degrees was the same as magnetic course northwest ⅛ west. The error no doubt crept in because Bjerre had been deducting one-eighth from northwest ½west, and the slight error was quite natural in giving his testimony.

In reference to Exhibit "V," it is sufficient to say that it was made by Dibrell, witness for respondent, to illustrate the error made by Bjerre on the witness stand when he said that the compass course northwest, with a deviation of two degrees to the east, was the same as the magnetic course northwest ⅛ west. The course pursued by the *Commodore* on the northwest ½ west course and the northwest course (both compass), is shown by the most easterly lines on Exhibit "V," and a glance at the exhibit will show that these courses were proper for the vessel to pursue, and as testified to by the masters above named.

The compass course as run did not set the tug at the end of the 17½ mile run .45 of a mile easterly of a point where Bjerre calculated he should

be, because he calculated to be where the *compass courses* would take the tug.

Tables Two and Three merely show that the tug ran 17½ miles between 11:19 p. m. and a few minutes before 1:45 a. m. (Record, pp. 345, 346). Capt. Johnson estimated the speed of the tug at 7½ knots between 11:19 p. m. and 1:00 a. m. and distance traveled 12½ miles (Record, p. 320). (Bjerre estimated it at 12 miles; Record, p. 291.) Johnson estimated that at half speed from 1:00 a. m. until a few minutes before 1:45 a. m., the distance traveled would be 3¾ miles (Record, p. 320), total, 16¼ (Record, pp. 344 and 263). This shows that the estimated distance fell 1¼ miles short of the actual distance traveled, which, in view of the increasing velocity of the wind of 30 miles or more per hour, driving the tug and barge ahead, and the tide setting to the northwest (the direction the tug was traveling) and possible currents (Record, *infra*) was not a discrepancy to be unexpected.

Causes of Tug getting off her Course:

Among the causes given by Capt. Bjerre that might have put the tug off her course, he stated that the distance of the tug from the Tree Point light might have been misjudged. He explained how there might have been a mistake of judgment in figuring that the tug was three-fourths of a mile off when she might, in fact, have been a greater distance. He said with reference to the Tree Point light:

"We saw Tree Point when abeam—saw it through the snow and the dirt there—just a few glimpses of it—we saw it there plain enough to know it was Tree Point light, but it was visible only for a very, very short time —it might have been three glimpses or it might have been a couple of glimpses of it—enough to know it was Tree Point light, but the weather was so thick, you see, we wouldn't get anything from it. Going by a light like that, if possible, I generally take an angle off the light to determine the distance we are off. There was a machine in the wheel house for that purpose, but that night the light was not visible very far through the mist and I did not use it at all,—we could not use it, and no angle could be determined because we could not get the cross bearings off the light—we couldn't see the light long enough to get a cross bearing—we would get a glimpse of it, but it was not enough to get a bearing off of it; so I asked the mate the distance that we were off the light, and he said between a half and three-quarters of a mile, or *possibly a mile*, and we set our course accordingly for Mary Island."

(Record, pp. 232, 233).

Respondent's *barge captain, Foster*, from the barge, saw Tree Point light and *he* judged it was three-fourths of a mile away, *just as Johnson and Bjerre did* (Record, pp. 40, 42), but he was not

sure (Record, p. 42). A reading of Foster's testimony (Record, pp. 42-48) in connection with respondent's map, Exhibit "C," and the courses drawn thereon by Foster, shows that the courses shown by the log book and by Johnson and Bjerre to have been steered from Tree Point, were proper and should have brought the tug past Mary Island light with a mile or a mile and a quarter clearance, just as Johnson and Bjerre calculated, as shown by their testimony (Record, pp. 264, 327). Foster, Johnson and Bjerre may all have been mistaken in judging their distance from Tree Point light, but they *all agree* that their distance from it was three-fourths of a mile; and they all agree that the weather was such as to prevent a more accurate determination. If a mistake was made as to the distance off Tree Point light, it was a mistake of judgment, and not negligence.

(The letter "A" in line 3 of the Record should be "H"—See Respondent's Exhibit "C" and Foster's testimony, p. 48, Record.) See also Dawe's testimony (Record, pp. 413, 414), and Cl. Ex. 26.

> "Q. To what do you attribute getting off your course and finding yourself head-on to that small island?
>
> A. Well, there are several things I attribute that to. In the first place, in passing the light at Tree Point *we only saw a glimpse of the light through the mist, and the one glimpse of that light did not give us any distance, and we had no means of getting it;*

and there is just a possibility that we judged the light to be from onehalf to three-quarters of a mile off and that threw us off the course; and of course in the course of further events it is possible that we might have been further off than we figured" (Bjerre, Record, pp. 264, 265).

Capt. Snoddy said (Record, p. 651) that even at Port Simpson (south of Tree Point) "we could not see lights any distance."

And in that connection Bjerre said that bad steering *on the part of the barge* might have thrown the tug out of her course (Record, p. 265). He further said that he did not know of anything that could have been done by a skillful, careful, prudent navigator to prevent the tug going in where she was that night, half a mile off the island when it was sighted (Record, p. 265), and that everything was done that anybody could possibly do (Record, p. 265).

Johnson, in giving the causes for the tug being off her course, said that he got a glimpse of the Tree Point light for a few seconds; that no bearing of that light could be got because it was not visible long enough to get any bearings (Record, p. 312).

While Johnson said that the tug got a departure from Lord Rocks of an eighth of a mile, he might have been mistaken as to that fact as well as the distance the tug was off Tree Point light. He was not sure about his distance (one-half or three-

quarters of a mile, Record, p. 312) off Tree Point light (Record, p. 485). Even as far south as Port Simpson, south of Lord Rocks, and south of Tree Point "we could not see lights any distance" (Snoddy, Record, p. 651).

Bjerre said that the currents were not taken into consideration "because that is an unknown quantity" (Record, p. 272). Johnson testified in substance the same (Record, pp. 326, 327). Although he said there might have been some unknown current there (Record, p. 327). He also stated on the same page of the record:

> "Q. I will ask you whether or not a tow has any influence on the course of a tug?
>
> A. If the barge ain't steering good it will influence her some."

It was for libellant to prove good steering on the part of the barge.

Capt. Bjerre was asked the following question: "To what do you attribute the breaking of the shackle?" to which he answered: "Well, I have not tried to fix the cause of the shackle breaking in any way. Probably the shackle was too light—it evidently was not as strong as it ought to have been; it was a weak shackle and that may have been due to a flaw in the shackle or it may have been due to crystallization or other causes" (Record, p. 265).

Capt. Nielsen testified: The tow frequently drags the tug sideways. Nobody can avoid a vessel getting off its course (Record, p. 673). The

elements must have thrown the tug out of her course (Record, p. 689). Witness had been thrown off his course, sometimes one way and sometimes the other, in going from Tree Point to Mary Island (Record, p. 690). Something unforeseen may have put the tug out of her course (Record, p. 696), but from witness' experience, the currents would not be a contributing cause to put her off her course. Currents do not amount to much (Record, p. 696). One can not tell in advance whether he is going to be set to the eastward or westward. "I have been going many times up and down there. Sometimes they set that way and other times they set me over on the eastern shore, practically in the same weather and the same tide conditions" (Record, p. 697). Capt. E. W. Smith ha similar experience (Record, p. 697). Capt. E. W. Smith had similar experience (Record, p. 607).

"Q. Do you know whether or not it is a usual occurrence for tugs to find themselves as the *Commodore* did, close to the shore of Mary Island, when running up there in the night time, dark nights and dirty weather?

A. Yes, that happened to me a good many times.

Q. When that happened to you, I will ask you whether or not you had used every precaution that a skillful and prudent and careful master would use?

A. Yes, sir."

(Record, p. 673.)

It is not possible for a competent, skillful and prudent master of a tug to judge the exact speed of his vessel, when having a tow, under the conditions existing the night of the accident (*Id.*) (To same effect, Bjerre, Record, p. 264.)

"Q. Why can not you do it?

A. It is an element, to my mind, that we are not acquainted with. The force of the wind may make an extra current; and the steering of the vessel at that time, you can not say what effect they will have on your tug."

(Record, pp. 673, 683, 689, 690, 696, 674.)

On cross-examination Capt. Cann testified:

"Q. Now with an *ebb* tide and that wind there would not be much set to the current there?

A. That you cannot tell, with a flood tide and a fair wind."

(The *Commodore* had a flood tide and fair wind of 30 or more miles per hour that night before the accident.)

Also:

"Q. Is it or is it not, Captain, an unusual thing for a vessel going from Tree Point past Mary Island, to get off her course, especially on dark nights?

A. It is very frequent. As I said a while back, it is a hard track to make. * * * My

experience is that I found myself over on the Mary Island shore, close to Mary Island shore, in towing up there, on more than one occasion."

(Record, p. 579.)

To same effect, Capt Brinker (Record, pp. 623, 628); Olsen (Record, p. 640); Jacobsen (Record, pp. 585, 589). Also to same effect is the testimony of respondent's barge captain, Foster (Record, p. 52).

Tug might have been off her course on account of error of judgment as to distance off Tree Point (Foster, Record, pp. 52, 53).

The speed of tug was reasonable at all times, Bjerre (Record, p. 259; Dawe (Record, p. 407); Johnson (Record, p. 320; half speed when shackle broke (Record, pp. 365-6).

"We figured we were on the course," Johnson (Record, p. 348).

Reasons given by Brinker for getting off course, uncertain currents and steering of barge. Brinker (Record, pp. 625, 628; Olsen (Record, pp. 630, 607, 643, 645, 646, 647); Nielsen (Record, p. 684).

There was no reason for the tug coming to anchor at Port Simpson (Record, pp. 729, 260, 343, 344, 260). Capt. Snoddy passed Port Simpson about the same time the Commodore did and he saw no reason for stopping (Record, p. 651); Barge Captain Foster saw no reason for stooping at Port Simpson (Record, p. 41); and he made no

suggestion in his testimony, that there was any neglect in getting off the course. He evidently attributed it to weather conditions arising after leaving Port Simpson (Record, p. 41). Both Capt. Bjerre and Johnson were of the opinion that the course of the tug, taking into consideration wind, currents, tide, the dragging of the barge, and other elements, that the tug would pass Mary Island light about a mile off (Record, pp. 264, 327). The testimony is that a half mile off Mary Island light is a safe clearance. If the tug, as Johnson and Bjerre believed, would pass Mary Island light at a distance of a mile or possibly only half a mile, as Bjerre said (Record, p. 264), then she was off her course between a half mile and a mile at the time she sighted the little island half a mile away, shortly before 1:45 a. m. Considering the condition of the weather, the tide, the increasing velocity of the wind, that it was a dirty, snowy and squally night, that the tide was setting to the northwest and the wind blowing in that direction, with possibly unknown currents caused by the wind and tide, the fact that the vessel was off her course from a half a mile to a mile (or whatever distance the Record shows) in running 17½ miles does not indicate any unskillfulness on the part of those in charge of the tug, and that is the concensus of opinion of the witnesses of the master mariners who had operated in these waters as masters of tug boats, as above shown.

Whistling for Echoes: It would have been entirely futile to whistle for echoes. Bjerre (Record, p. 259); Olsen (Record, p. 641); Snoddy (Record, p. 662); Nielsen (Record, pp. 685, 693; Dawe (Record, p. 380).

Would not whistle for echoes until I had run 18 miles from Tree Point. Capt. Snoddy (Record, p. 658).

Capt. Cann testified that "*with time and distance* run, it is proper to slow down and blow whistle and try to catch an echo." But the *Commodore* had not run her distance, in the opinion of Johnson and Bjerre, because they estimated the vessel had run only 16¼ miles and she had not run her time. She had slowed down at one o'clock. Capt. Cann would not have blown for echoes under the circumstances:

Turning Back on Course:

The distance between Tree Point and Mary Island light is 20 or 21 miles (Record, p. 263). Mary Island light, that night, could be seen only two or three miles (Bjerre, Record, p. 271). Bjerre and Johnson estimated tug had gone only sixteen and one-fourth miles (Record, p. 263), so they were not within seeing distance of the light, hence no reason for believing tug was off her course and no reason for turning back, or doing anything else than proceed. The tug had run neither time nor distance when the shackle broke. Bad seamanship to double back. (Cann, Record, p. 575); Olsen (Record, pp. 674-5); Snoddy (Rec-

ord, p. 658); Nielsen (Record, pp. 674-5). Smith would slow down, turn round and *wait, if he considered he had made his distance* (Record, p. 617), but that night he would not go back on course, if he had been navigating the *Commodore* (Record, pp. 618, 621).

Log can not be used in those waters (Record, pp. 264, 645); Smith (Record, p. 609); Jacobsen, (Record, pp. 588, 589).

No neglect in not heaving lead: The shackle broke in deep water, one-fourth or one-half mile out in the channel. See Cann (Record, p. 580); Brinker (Record, p. 628); Olsen (Record, p. 640); Dawe (Record, p. 384); Jacobsen (Record, p. 589).

Horn on Mary Island could not have been heard —too far away. (Olsen (Record, pp. 643, 647); Dawe (Record, p. 389). Other witnesses gave similar testimony.

Navigators are not chargeable with negligence unless they act in a manner which nautical experience and good seamanship condemn under the circumstances shown.

The Clarence L. Blakeslee, 243, Fed. 365 (C. C. A.).

And the exercise of his judgment in good faith by the master will not be deemed negligence on the part of the tug if later findings should show it to be faulty.

The Cocington, 128 Fed. 788 (D. C., affirmed in 140 Fed. 985.

The Czarina, 112 Fed. 541 (D. C.).
The Startle,, 115 Fed., at p. 564.
The William E. Gladwish, 196 Fed. 490 (C. C. A.).
The Hercules, 73 Fed. 255 (C. C. A.).
The Argus, 31 Fed. 481 (D. C.).
The Wilhelm, 47 Fed. 89 (D. C.), affirmed in 52 Fed. 602.
The Charles Allen, 23 Fed. 407.
The Snap, 24 Fed. 292.
The Hardy, 229 Fed. 985 (C. C. A.).
Canton Ins. Co. vs. "The Goliah," No. 4,264, In Admiralty, West. Dist. Washington, D. C., Neterer, J., Nov., 1917.

"And on the question of negligence, it may be said that stranding of the tow does not render the tug liable, nor give rise of itself to any presumption of negligence on the part of the tug and the burden of proof is upon the libellant to show negligence. *L. P. Dayton*, 120 U. S. 327; *James P. Donaldson*, 167 U. S. 599."

The Goliah, supra.

" 'The owner of a vessel does not engage for the infallibility of the master, nor that he shall do in an emergency precisely what, *after the event*, the owners may think would have been best.' *James P. Donaldson*, 19 Fed. 264-266, affirmed in 167 U. S., *supra*."

The Goliah, supra.

On all the issues above mentioned, the Dis-

trict Court found against the respondent.

The testimony above quoted or referred to does not exhaust all of the testimony of the witnesses upon a given point. An exhaustive treatment would unduly lengthen the brief. It is confidently believed that a perusal of all the evidence will convince the mind of the reader that all the claims of petitioner are fully justified.

The opinion and findings of the District Court are specially referred to, and it is urged that the decree of the Circuit Court of Appeals be reversed and the decree of the District Court affirmed.

Respectfully submitted,

C. H. FARRELL,
J. H. KANE,
W. B. STRATTON,
Proctors for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 190.

BRITISH COLUMBIA MILLS, TUG AND BARGE COMPANY, PETITIONER,

vs.

A. W. MYLROIE.

ADDITIONAL BRIEF FOR PETITIONER.

C. H. FARRELL,
J. H. KANE,
W. B. STRATTON,
Counsel for Petitioner.

710 L. C. SMITH BLDG.,
Seattle, Washington.

(28,021)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 190.

BRITISH COLUMBIA MILLS, TUG AND BARGE COMPANY, LTD., A CORPORATION, PETITIONER,

vs.

A. W. MYLROIE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

ADDITIONAL BRIEF OF PETITIONER.

FIRST.

By leave of court the petitioner, in answer to respondent's contention (on page 97 of his brief) that "The Towage Contract expressly negatives exemption from liability for negligence on the part of the tug," states:

1. This point was not raised or presented in the District Court of Alaska, nor in the Circuit Court of Appeals, nor in respondent's brief in answer to the petition for the writ herein. It is now suggested for the first time and, we submit, comes too late. Both the District Court and the Circuit Court of Appeals, as we read their decisions, found the fact to be that the contract as made did, if valid, exempt from liability for negligence. This finding, unless clearly erroneous, will not be disturbed.

Workman *v.* New York City *et al.*, 179 U. S., 552.
The *Carib Prince*, 170 U. S., 665, 658, and cases cited.

2. The meaning of the contract and the intent of the parties, is plain if the contract is read by itself, but when read in connection with the letters set out on pages 20, 21, 22, and 23, of petitioner's brief, all doubt is removed, and the intention of the parties, to exempt, made entirely certain.

The language of the contract is plain and emphatic—"The tug company is not to be held liable for *any* damage which might happen to said barge *Bangor* or its cargo while in tow or at anchor." This language is general and emphatic, and shows intent to exempt from *all* damage not resulting from fraud or bad faith. Courts may not read an exception into a contract, because to do so is to hazard defeat of the intent of the parties on a mere conjecture, and the tug being liable only according to the strict terms of the contract, no principle of public policy requires that its language be subjected to unnatural restraint, so as to create an exception not expressed.

Santa Fe R. R. Co. *v.* Grant Bros., 228 U. S., 177.

3. In the first sentence in paragraph 3 of the contract (p. 24, respondent's brief), the "assistance" means help, aid, succor, and has no reference to the performance of the towage service. For example, if the barge sprung a leak, or caught fire, or lost part of her deck load overboard, or a seaman was washed overboard, or if she stranded, or her shackle broke, an emergency would arise within the meaning of that first sentence. Respondent expressly agreed (see letters above) that the "negligence on part of tug or crew" would not give rise to such an emergency for he asked petitioner to write him a letter agreeing that the petitioner should be liable for such negligence. If his contract already covered it, why ask an additional agreement to cover it? Why has respondent waited *five years* to discover what he meant by his contract? He cannot accept the service of the tug, on his own express agreement as to what the contract means, thereby securing the services at a reduced price (letter, page 12, petitioner's brief), and then, *after the event*, deny the contract and his own construction and agreement as to its meaning; for that would be a fraud on petitioner. Respondent received his consideration for taking the gambler's chance referred to by him in his letter written the same day the contract was signed by him (p. 21, petitioner's brief), but now, *after the event*, and after the "good gambler" had lost, he seeks to recover the *very thing* he waived in order to get the towing service performed at all, or at the small price mentioned in petitioner's letter to him. The contract was drawn by laymen who understood it, and justice requires that *both* parties be bound by it to the end.

4. The words "any loss" in the contract, means, under the Santa Fe case, *supra, all loss*, whether caused by negligence

or otherwise. It therefore also exempted from liability on account of *unseaworthiness* of the tug.

5. In the case of the *Monarch,* 235 Fed., 795, the language of the contract was different from that in the case at bar, and the same remark applies to the case of Elderslie S. S. Co. *v.* Barthwick (H. of L.), 10 Asp. Mar. Cas. N. S., 24-26.

SECOND.

On page 102 of respondent's brief it is contended that "under the local law of Alaska the tug, in towing the barge in Alaskan waters, was subject to all the obligations of a common carrier." This also is a question not heretofore suggested by respondent.

At page 103 of said brief it seems to be admitted that not the local law of Alaska, but the general maritime law, controls in determining the validity of a contract exempting a tug from liability for her neglect.

On the above-quoted proposition, however, we submit:

(*a*) The Act of Oregon of 1880 is unconstitutional under article IV, section 20, Constitution of Oregon, as set out on page 111 of respondent's brief, because declaring tugboats to be common carriers is not within the title of the act (see p. 104, resp. brief).

(*b*) The act did not intend to make tugs common carriers except as to discrimination, and did not intend to prohibit them from making valid contracts of exemption from liability for negligence. This appears from sections 1 and 2. Section 1 does not enlarge section 2 (p. 104, resp. brief).

(*c*) The act of Congress of 1884 (p. 103, resp. brief) did not adopt the Oregon Act, as it was inapplicable and in conflict—

1st, with the Oregon Constitution, and void.

2d, it was in conflict with the general maritime laws of the United States, as shown by

Workman *v.* New York City *et al.*, 179 U. S., 552.
Jensen *v.* Southern Pac. R. R. Co., 244 U. S., 205.
Stewart *v.* Knickerbocker Ice Co., 253 U. S., 149.
Atlantic Transport Co. *v.* Imbrovak, 234 U. S., 52.
State *ex rel.* *v.* Daggett, 87 Wash., 253.
Shaughnessy *v.* Northland S. S. Company, 94 Wash., 325, 331.

3d. Congress cannot be presumed to have adopted a law which would make one maritime law operative in Alaska and a different one in other parts of the United States and thereby discriminate against maritime contracts in Alaska.

Workman *v.* New York *et al.*, *supra.*

(*d*) The Oregon Act was penal and, if ever adopted, was repealed, 1st, by the act of Congress of March 3, 1899, "to enforce and punish crimes in the District of Alaska and to provide for a code of civil procedure in said district," chapter 429, 30 Stat. L., 1253. Sections 3 and 4 of the Oregon Act are penal and sections 1 and 2 define the crime; and

2d, by the act of Congress of June 6, 1900, as shown by note to section, Vol. 1, Fed. Stat. Ann. (1st edition), p. 37, where it is said the section is undoubtedly repealed;

3rd, by act of Congress of August 24, 1912, creating a legislative assembly for Alaska and providing that the Constitution and laws of the United States, not locally in ap-

plicable, shall have the same force and effect in Alaska as elsewhere in the United States, chapter 387, section 3, 37 Stat. L., 512.

(*e*) The Oregon Act is in conflict with the commerce clause of the Constitution of the United States as interfering with interstate and foreign commerce.

Jensen *v.* Southern Pacific R. R. Co., *supra.*

Stewart *v.* Knickerbocker Ice Co., *supra.*

Atlantic Transport Co. *v.* Imbrovak, *supra.*

(*f*) It is also in conflict with the treaty between the United States and Great Britain, of 1815, 8 Stat. L., 228.

(*g*) The Oregon Act applied only to tugs plying exclusively in State waters. The tug "Commodore" is not shown to have prior to March, 1917, done any towage service, for hire, in Alaska, and then it was engaged in foreign commerce.

Regarding the towage contract attaching (seventh point, p. 119, respondent's brief), we add to what is said on pages 44 to 52 of petitioner's brief:

1. The tug has a crew of 13, which was one more than a sufficient number under the laws and usages of British Columbia (Master Johnson, Rec., p. 209); so the tug was seaworthy under those usages and laws.

In Hazen *v.* New England Marine Insurance Co., 8 Pet. 557 (8 L. Ed., 1043) at 581, the court says:

> "A question of seaworthiness is determined by the usages of the port where the vessel is fitted out, in reference to the destined voyage * * * and the

> underwriters are presumed to know what constitutes unseaworthiness in a foreign port and to act under this knowledge."

To same effect, vol. 4, Joyce on Ins., section 2163, second edition, year 1918, and cases cited.

The Hazen case, we think, controls. Now, under above rule, if the undertaking as to seaworthiness of the ship owner (the petitioner) to the shipper (the respondent) is coextensive with that of shipper to insurer, as stated in the "Caldonia," 157 U. S., 124, then the petitioner was conclusively bound to know that in British Columbia, the tug, with a crew of twelve, was seaworthy.

In fact, however, the crew of thirteen, under the evidence, sufficiently manned the tug. That is a question of fact and the evidence, we contend, shows no failure on the part of the tug for want of an insufficient number of crew.

But even if the tug were unseaworthy because the crew was not sufficient in number, still the tug is not liable unless that caused the loss. That, as we understand, is the rule announced in the "Caledonia," 157 U. S., 134, in which the court quotes from a Massachusetts case as follows:

> "If the goods are lost *by reason of any defect in the vessel,* whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that the vessel shall be fit for the use for which he employs her. This principle not only applies in charter policies and insurance policies, but it is equally applicable to contracts of affreightment."

And the court also quotes from Kent as follows:

> "* * * The owner must answer *for the damages caused by the defect,"* etc.

See also—

Port Blakeley Mill Co. *v.* Springfield, etc., Ins. Co., 56 Wash., 681 (two opinions in same case, reported in 28 L. R. A. (N. S.), 593; cited in 59 Wash., 502, and 69 Wash., 536; same title, 59 Wash., 501; cited in 61 Wash., 598, and 68 Wash., 175.

2. Unseaworthiness of the tug, even if it had existed, was exempted under the contract, because *all loss,* whether caused by negligence or otherwise, was included in the exemption clause.

Santa Fe R. R. Co. *v.* Grant Bros., 228 U. S., 177.

Respectfully submitted.

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